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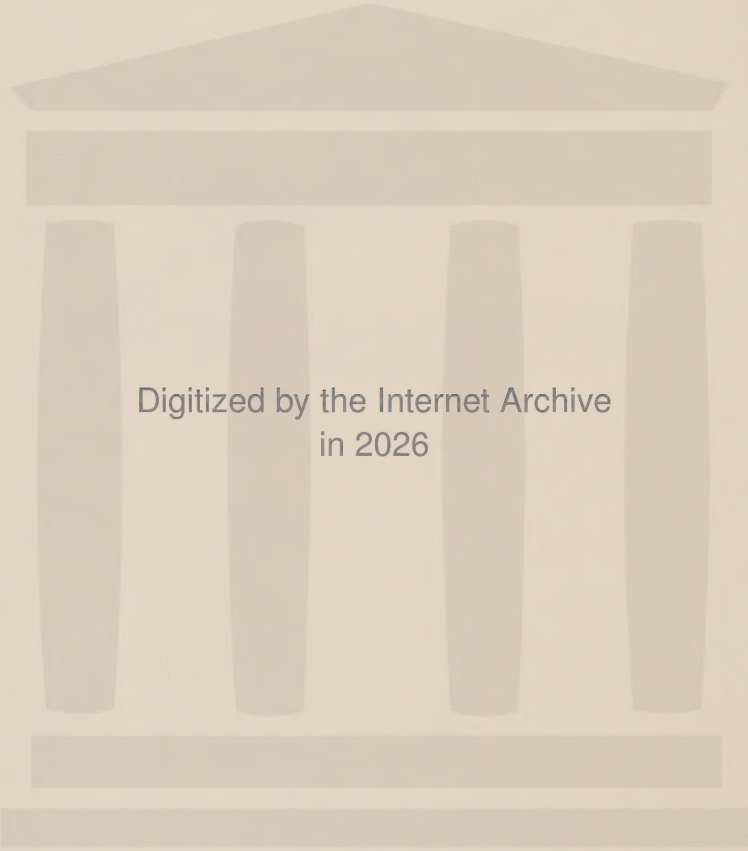
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CAMBRIDGE LAW
JOURNAL

EDITED BY

P. H. WINFIELD, LL.D., F.B.A.

Rouse Ball Professor of English Law

FOR

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THE
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PROFESSOR W. W. BUCKLAND.

IT is no exaggeration to say that there are hundreds who will join us in congratulating Professor Buckland, or rather in congratulating the Cambridge Law School, on the approach of his eightieth birthday, and on the retention of a vigour that time has not touched. He would not wish us on this occasion to enumerate his illustrious services to scholarship and to Cambridge. Some account of these may be found in the volume of Cambridge Legal Essays presented to Dr. Bond, Professor Buckland and Professor Kenny in 1926; and a list of his writings will be found on a later page of this Journal. Here we will reluctantly confine ourselves to assuring his pupils and friends the world over that his eye is not dim nor his natural force abated, and expressing the hope that we may be able to draw for many years to come on the inexhaustible riches of his learning and wisdom.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.*

The Right Hon. Sir GEORGE RANKIN, Kt.

IN November, 1921, Lord Haldane delivered to the Cambridge University Law Society an address on the Judicial Committee of the Privy Council (*Cambridge Law Journal*, vol. i, p. 143). He was then an ex-Lord Chancellor and for thirty-eight years had had experience of that tribunal—for twelve years as one of its judges. If it seems unnecessary and even unfortunate that the same subject should be given to me, I may point out—though only by way of confession and avoidance—that Lord Haldane on that occasion insisted that ‘You cannot learn much about it from documents’—‘unless you have lived in it and in the atmosphere you do not know what happens there’—‘the only way to study it is to watch it’. Seventeen years are time enough to include several generations of law students, time enough for the individual to pass from college benches to the highest of responsibilities; and the years since 1921 have seen more than one change in the working of the Judicial Committee. Within one year of Lord Haldane’s address, the Irish Free State had come into existence or perhaps I should say into statutory recognition; and in July, 1923, Lord Haldane was presiding over a Board of three—himself, Lord Buckmaster and Lord Parmoor—to consider the first petitions for leave to appeal from its Courts. He delivered on that occasion an allocution to the Bar which as a clear and authoritative account of the Judicial Committee and its functions deserves your most careful attention. You will find it reported in *Hull & Co. v. McKenna* [1926] Ir. R. 402. Again in 1926 in the case of *Nadan v. The King* [1926] A. C. 482, the Parliament of Canada by the Criminal Code of Canada had purported to take away the right of appeal to the King in Council in criminal cases. By the judgment of the Board delivered by Viscount Cave, L.C., it was held that this was beyond the competence of the Parliament of Canada, and a clear and careful statement was given of the history of the Judicial Committee and of its statutory position

* A lecture delivered to the Cambridge University Law Society on Friday, October 28, 1938.

since 1833. Alas, both of these cases are no longer law—so far as the actual decision goes. Since *Moore v. Att.-Gen.* [1935] A. C. 484 it seems that the appeal from Ireland and the criminal appeal from Canada are things of the past, the Statute of Westminster, 1931, having made possible their abolition.

The Judicial Committee of the Privy Council acts as the final Court of appeal from all Courts in the British Empire save those of England, Scotland and Northern Ireland. From these last-mentioned countries the final appeal lies, as you know, to the House of Lords. These two tribunals of last resort share the services of the Lords of Appeal in Ordinary and of certain other judges who are both peers and Privy Councillors, but in spite of this important common element in the personnel, the contrast between the two tribunals is marked and significant. That one set of appeals should be disposed of by orders recorded in the Lords' Journals—orders of the Peers of Parliament in formal session with the Lord Chancellor or other 'Speaker' on the woolsack; while another set of appeals is disposed of by a mere committee tendering advice—this is in itself a challenge to our attention. And in each case much else requires to be explained. How comes it that for these islands jurisdiction in appeal became vested in one only of the two Houses of Parliament, and why in Parliament at all? How is it that to the Dominions overseas the highest judicial determination comes in the form of an Order in Council, the very voice of executive authority? Such questions will press strongly for an answer: especially if, like Bishop Stubbs, you hold 'a strong conviction that constitutional history is the absolutely necessary background for all other history, and that until this has been arranged, little else can profitably be done'.¹

The jurisdiction both of the House of Lords and of the Judicial Committee is now statutory, but both derive from a common origin and only their history can explain their differences. The King in the twelfth century, so far from being one who reigned but did not govern, taxed, judged and administered; but he did so with the assistance of a feudal Council, out of which have grown the most fundamental of the institutions which go to make or to give character to the British Constitution. This feudal Council originally consisted of all the tenants-in-chief: in practice the great noblemen and officials could alone be habitually attendant upon the King. It was variously known as the *concilium regis*, *curia regis*, and on more

¹ Cf. Maitland, *Collected Papers*, vol. iii, p. 503.

important occasions the *magnum* or *commune concilium*. The main theme of our constitutional histories is the differentiation which has taken place in the course of time in its functions and the forms of its authority. I take it that students of your generation are pupils of Maitland just as much as those of us who used to attend his lectures at Downing thirty years ago. In any case, you will have read in Anson's and in other works how out of this feudal Council the great distinction between legislative and executive authority came by degrees; how, though it would be wrong to say that originally the King was the fountain of justice, the regular Courts of law known as the King's Courts arose to supersede the old Courts of the manor and the shire, but without exhausting the judicial power of the Crown.

It is not for an old Indian judge to come here and lecture on what Simon de Montfort did in 1265 or the Model Parliament of Edward I,—1295 and all that. The addition to the Council of representatives of cities and boroughs as well as the knights of the shire, is perhaps the best-known landmark on the road which leads from the old *Curia Regis* to parliamentary institutions. It is a long road and one which all students of our history must travel, and it is not so clear or plain as at one time our historians thought. From Mr. Lapsley's editorial notes to the Selected Essays of Maitland (1936) you can learn for yourselves of the research that still goes on to trace accurately the early stages of the process which in the end leads to a distinction—now so broad—between the King in Parliament and the King in Council. In the second half of the twelfth century the King's Court—the *Curia Regis*—conducted or supervised the whole machinery of government, exercising executive, legislative and judicial functions, and making its power felt throughout the whole country.² At the beginning of the thirteenth century no clear distinction had emerged between legislative and executive authority. At this stage (in Maitland's words)³: 'A Parliament is rather an act than a body of persons. . . . It is but slowly that this word is appropriated to colloquies of a particular kind, namely those which the King has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the King has summoned. As yet, any meeting of the King's Council that has been solemnly summoned for general business seems to be a 'parliament'.

² Holdsworth, *Some Makers of English Law*, p. 11.

³ Selected Essays, p. 48.

You will remember that though the three great Common Law Courts which survived until the Judicature Acts (1873—1875) were established before the end of the thirteenth century, the King's power as the fountain of justice lay behind and beyond them, and those who complained of injustice could still appeal to him.

In the reign of Edward I (1272—1307) their constitution and jurisdiction were becoming settled. Though as yet the King's Bench was closely connected with the King's Council, and continued to be closely connected with it till nearly the end of the fourteenth century, there are signs of a coming separation which will divide the Council from the common law Courts, and will thus foreshadow the division between the executive and the judicial departments of the State.⁴

'By 1400, . . . Parliament, the Council and the three common law courts are completely separate bodies each with its own set of records, and its own forms of procedure . . . But though normally litigation in the King's Court goes to one or other of the separate law courts, . . . neither Parliament nor Council—both of which consider themselves superior to the common law courts—have entirely abandoned the judicial field to them. Parliament hears appeals from the King's Bench, and the Council . . . claims to exercise on behalf of the Crown a residue of judicial power which will enable it to supplement the ordinary Courts with its own extraordinary justice.'⁵

Originally, what we would now call appeals were made simply by petition—to the King, to the King in Council and later sometimes to the King in Parliament. It was necessary for petitions to be sorted out. From the beginning of the fourteenth century, receivers and triers of petitions were appointed, and they continued to be appointed at the beginning of every Parliament down to 1886. The trier's duty was to send each petition to the appropriate authority—the judges, the Chancery, the Council or Parliament. These receivers and triers came to be appointed in two groups: (1) for Great Britain and Ireland; (2) Guernsey, lands beyond the seas and the isles.

Of petitions to the Council, some were dealt with by the Chancellor, and successive Chancellors, as we all know, built up a body of rules affording remedies which the Courts of Law did not provide: that great system which we know as Equity. Other petitions to the Council were dealt with differently: poor

⁴ Holdsworth, *op. cit.* p. 27.

⁵ Radcliffe & Cross, *The English Legal System*, p. 61.

men's complaints or complaints by members of the King's household were entertained, and this jurisdiction developed into the Court of Requests, sitting in Whitehall, which lasted till 1642. Another and far more important jurisdiction of the Council came to be committed to a special Court known to history as the Court of the Star Chamber: this was a criminal jurisdiction—'cases in which the strong hand of the executive was needed'—misconduct of ministers, disregard of proclamations, conspiracy, etc. This is the jurisdiction which the Long Parliament abolished in 1641—not only doing away with the Star Chamber Court but also forbidding the Privy Council to intermeddle in civil cases and suits of private interest between party and party. 'With this enactment', says Anson,⁶ 'the judicial power of the King's Council acting as a Court of first instance within the jurisdiction of the Courts of Law, is brought to a close.'

The control of the Common Law Courts was by no means a matter solely for the King in Council. Those who were dissatisfied with their decisions petitioned the King in Parliament. Cases of 'error' came to be dealt with by Parliament. In the reign of Henry IV, early in the fifteenth century, the Commons requested to be relieved of the judicial business of Parliament, and the Lords alone exercised this jurisdiction: appeal lay to the House of Lords by writ of error from the Common Law Courts. Since the seventeenth century, the House of Lords has exercised jurisdiction also from decrees in Equity: these appeals at first being brought by petition.

Thus it is that one branch of the Legislature is found functioning as the highest Court of Appeal. 'The King's Council in Parliament passed . . . into the House of Lords and carried with it certain privileges and duties attributable to its earlier stage of existence. It is not as a representation of the baronage but as members of the *concilium regis* that the peers are the hereditary counsellors of the Crown, and in their judicial capacity form an ultimate Court of Appeal. It is because they were once members of the *concilium regis* that the judges are now summoned to advise though not to sit as peers of Parliament.'⁷ This statement from Anson is perhaps preferable to the language of Lord Haldane in his address to your Society in 1921—that 'Parliament usurped the jurisdiction from the King in the case of England, and then the House of Lords usurped it from the House of Commons'.

⁶ Vol. ii, pt. i, p. 86.

⁷ Anson, vol. i, pp. 52-3.

The appellate jurisdiction of the House of Lords is now a matter of enactment—the Appellate Jurisdiction Act of 1876 crystallizes the somewhat tortuous history which we have been trying to recall. It is the House of Lords in the full sense that exercises this jurisdiction. There is nothing but the convention of the House to prevent any Peer of Parliament from taking part, but the Act has prohibited any appeal from being heard or decided, unless there are present at least three Lords of Appeal. Its appellate jurisdiction is not the only judicial function of the House of Lords: it has still two others—to try persons on impeachment by the Commons, to determine peerage claims; and a third—threatened but not yet abolished—the criminal jurisdiction to try peers charged with treason or felony. You know, of course, that from time to time there is talk of reforming or, shall we say, reconstituting the Second Chamber. Lord Haldane had a word to say on that:—

‘If the House of Lords should be reformed, I think the reform should take the shape, as it may in the end, of the judicial functions of the House of Lords being transferred from what will then be a merely political Second Chamber. It may well be that the usurpations of the past will be undone and the jurisdiction of England, Scotland and Ireland will revert to the King in Council, to whom it used to belong.’⁸

As I have indicated, however, I doubt if you should regard these ancient developments as usurpations. It would appear that the Common Law judges were more ready to accept the interference of Parliament than of the Council, and the House of Commons willingly and indeed inevitably gave up its share in the judicial functions of Parliament.

II.

The appeal to the King in Council from H.M. Dominions beyond the seas has no such tortuous history. However difficult it may be to explain why the dissatisfied suitor in this country should have a right of recourse to the House of Lords, the true constitutional answer to the question why the Canadian, Australian or Indian appeals to His Majesty in Council is simply that there is nothing to hinder him. Now that the jurisdiction has been made statutory and that statutory exceptions have been made, this answer may not fully satisfy the careful or technical

⁸ *Camb. Law Journal*, vol. i, p. 155.

enquirer, but it is still the substance of the matter. It follows from the position of the King as the fountain of all justice throughout his Dominions—a doctrine which has long been an axiom of the constitution though it was not so originally.

Lord Cave in the Canadian case already mentioned (*Nadan's Case* [1926] A. C. 482, 491) put it thus:—

‘The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty’s Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign, as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty’s Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King’s subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases: see *R. v. Bertrand* (1867) L. R. 1 P. C. 520. It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two—namely the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41) and the Judicial Committee Act, 1844 (7 & 8 Vict. c. 69). The Act of 1835 recites that “from the decisions of various courts of jurisdiction in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council”, and proceeds to regulate the manner of such appeal; and the Act of 1844 . . . enacts (in section 1) that it shall be competent to Her Majesty by general or special order in Council to “provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of justice within any British Colony or Possession abroad”. These Acts and other later statutes by which the constitution of the Judicial Committee has from time to time been amended give legislative sanction to the jurisdiction which had previously existed.’

One would wish indeed for a fuller history of this right of appeal than is at present available. The Channel Islands stood in a special relation to the Conqueror as the Duke of Normandy, and this may be part of the reason why they provide the earliest cases. They were part of the Duchy of Normandy: they passed to the English Crown when the Duke of Normandy

became King of England, and remained to the English Crown when Normandy was lost.⁹

There is an Order in Council dated 1580 prescribing conditions under which appeals from Guernsey may be prosecuted: this forms the basis of the provisions which have ever since regulated appeals from overseas. The plantations or colonies—to use words which have since lost favour—began to be of importance in the seventeenth century—America, the West Indies and the East India Company's possessions.

In 1667, a Committee of the Privy Council was set up called 'The Committee for the business of Trade' and given jurisdiction to entertain appeals not only from the Channel Islands but from foreign plantations. In the first volume of Vernon's Reports, you will find the case of *Jennet v. Bishopp* dated 1683. A bill of appeal had been brought in the Court of Chancery from the Court of the County Palatine at Chester. The Lord Keeper held that it would not lie—if any appeal lies it must be to the King himself. And in *Fryer v. Bernard* in 1724 (2 P. Wms. 261), a party asking for a process of sequestration to be directed into Ireland said that such process had been awarded to the Governor of North Carolina. 'The Court doubted much whether such sequestration should not be directed by the King in Council, where alone an appeal lies from the decrees in the plantations.' In the eighteenth century special Acts of Parliament were in some instances passed to regulate the right of appeal from overseas, *e.g.*, the Act of 1773 which set up the Supreme Court at Calcutta (cf. section 18 of 13 Geo. 3, c. 63, and clause 33 of the Charter of 1774). The records of appeals during the seventeenth, eighteenth and early nineteenth centuries are scanty and of the constitution of the Committees which heard them little is known. No provision can be traced requiring the presence of anyone with judicial experience. There is an Order in Council of 1696 providing that three members should form a quorum but it is probable that the quorum was often composed of laymen. This state of things was brought to an end by Lord Brougham to whom the Judicial Committee Act of 1833 is due. It was amended in 1844 but, as you may have gathered from Lord Cave's judgment in *Nadan's Case*, it constituted the Judicial Committee of the Privy Council as we now know it, though in the course of a century changes have been made and additional rules have been introduced. By section 4, the Act of 1833 gave to the Committee

⁹ Anson, vol. 2, pt. 2, p. 55, 4th ed.

jurisdiction to hear matters which may be specially referred to it by His Majesty. It has jurisdiction in certain English matters. Though its former jurisdiction as a Court of appeal for England in Admiralty and in Lunacy was taken away by the Judicature Act of 1873, it has still jurisdiction in ecclesiastical cases in England, and under the Union of Benefices Measures 1923 to 1936. In time of war it is the supreme Court of Prize. But its main occupation is with appeals from the Courts established in His Majesty's Dominions overseas.

III.

The Lord President of the Council is technically the head of the Judicial Committee, but he is usually not a lawyer, and takes no part in the ordinary business of the Committee. Membership of the Privy Council does not of itself qualify to sit on the Committee though it is a *sine qua non*.

The Judicial Committee is by no means the only Committee of the Privy Council: committees are appointed from time to time for various purposes of enquiry; and, apart from the Board of Trade, which is, and the Cabinet, which is not, a committee of the Privy Council, Anson mentions as at present existing five other standing committees besides the Judicial Committee—*viz.* for the Universities of Oxford and Cambridge, for the Scottish Universities, for the grant of charters to municipal corporations, for the Channel Islands, and for the baronetage (vol. II, part I, p. 152). Some of these, like the Judicial Committee, are statutory.

The Act of 1833 and amending Acts have prescribed the classes of persons who may act on the Judicial Committee, and of these, as Lord Haldane put it, 'those who come are carefully invited, and are there by royal authority and the joint advice of the President of the Council and the Lord Chancellor'.

* In practice, the regular members of the Board are the Lord Chancellor, the seven Lords of Appeal in Ordinary and the two judges appointed, for their experience in Indian cases, under the Appellate Jurisdiction Act of 1929. * Ex-Lord Chancellors and certain retired judges from England, Scotland or overseas sit from time to time as volunteers. * The Lords Justices are Privy Councillors and qualified to sit, but they are so fully occupied elsewhere that they are seldom seen at the Board. Each year, however, one or other of the Canadian judges comes over and sits for about a month and his expenses are paid by

his Government, and occasionally an Australian judge may be seen at the Board. You can see, therefore, that Lord Haldane's claim is not ill-founded—that 'we sit as an Imperial Court which represents the Empire and not any particular part of it'.

The place at which the Judicial Committee does its work is the Downing Street end of the Treasury building which lies on the West side of Whitehall. The main room of the two in which appeals are heard is both handsome and convenient, but for some reason it has become a fashion to magnify the importance of the Committee and its work by contrasting these with the meanness of its surroundings. 'Almost all the laws and customs of the world—civilized and uncivilized—' said Sir Courtenay Ilbert, 'come up for discussion in that dingy, little room where the Judicial Committee of the Privy Council hold their sittings.'¹⁰ A woman journalist in 1929 described it as 'a pleasant looking room the size of a largish dining room in a country house and having the same smell of leather, English gentlemen, and old, old dust'. In 1921, Lord Haldane described the Downing Street door as very dirty and the staircase as rather dilapidated looking, but he agreed that the Board room was 'a really respectable and nice looking Court-house panelled with oak with a high ceiling—everything in short that a Court should be'. The smaller room cannot, however, be so described.

Of course, the place at which a mere Committee sits can have no constitutional importance. 'The Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law' (*Hull v. McKenna* [1926] Ir. R. 402, 404). When the Judicial Committee sits—as it generally does in the summer—in three divisions, one of the Boards sits in a Committee room in the House of Lords or in a Law Court in the Strand. There seems to be no constitutional objection—for that matter—to the Board which hears Indian appeals being sent out to India.

It is substantially (if not literally) true to-day that—South Africa apart—provision has been made whereby all over the Empire litigants can in some cases appeal to His Majesty in Council without getting special leave—*i.e.* leave from His Majesty in Council. The would-be appellant can get from the local Court which has decided against him what is variously called 'leave to appeal' or a 'certificate' that the case is fit

¹⁰ Journal of Soc. of Compar. Legislation, vol. ix, pt. i, p. 23.

to be taken on appeal. He is entitled to this as of right if the matter in issue has a certain value, while in other cases it is in the discretion of the local Court to give or refuse it. Separate Orders in Council have been passed for the different countries overseas to regulate this matter as each country had its own practice and requirements. In most countries the limit of value below which there is no appeal as of right (in this sense) is either £300 or £500, but in some countries it is higher—*e.g.* Eastern Africa £650, Alberta £1,000, Manitoba £1,000, Tasmania £1,000 in some cases and £500 in others. The limit expressed in terms of the local currency is in Ceylon 5,000 rupees, Mauritius 10,000 rupees, Seychelles 10,000 rupees: expressed in dollars it is in British Honduras 1,500, in Straits Settlements 2,000 and in Saskatchewan 4,000. In India the matter is governed by sections 109 and 110 of the Civil Procedure Code. In exceptional cases an appeal may be admitted by an Indian High Court though the money value at stake be small: otherwise the limit of value is 10,000 rupees and if the Courts in India have not differed there must be shown a substantial question of law. The reason for this last requirement is the rule of practice, which I shall refer to later, that the Board will not as a rule disturb concurrent findings of fact. This requirement has not, however, been applied to the Empire generally though the rule of practice is applicable to all civil appeals (*Robins v. National Trust Co., Ltd.* [1927] A. C. 515).

Most of the appeals which come before the Board begin by an order from a Court overseas in the way I have described. Apart from such cases, the appellant must begin by obtaining leave to appeal from the King in Council. His petition for leave is referred for report to the Judicial Committee, which gives a hearing to the parties and, if the Committee recommend that leave be granted, an Order in Council is made to that effect. The Committee has, of course, to take account at this stage of any statutory restrictions which may have been placed upon His Majesty's prerogative to hear appeals from the country in question. Not only so, but at this stage the discretion of the Committee has to be exercised with due regard to the conditions obtaining in that part of the Empire from which the appeal is brought. It is here that the appeal to the King in Council is seen to differ in principle from the appeal to the King in Parliament. 'In the olden days, the appeal to the House of Lords was as of right, as it is from Northern Ireland to-day, but the appeal to the Privy Council is not as of right; it is an appeal to the King's discretion, and it is founded on a petition

that he should exercise his discretion' (Lord Haldane in *Hull v. McKenna*, *supra*, at p. 405). But as Rules (laid down by Order in Council and otherwise) give a right in certain cases to an order from the Court overseas admitting an appeal to His Majesty in Council, and as the appeal to the House of Lords from the Court of Appeal in England is now competent only by leave (Administration of Justice (Appeals) Act, 1934, s. 1) the distinction is no longer so clear as it once was.

Apart from India and the Crown Colonies, the British Empire beyond the seas comprises and mainly consists of the five Dominions of Canada, Australia, South Africa, New Zealand and Newfoundland.

Canada.—Each of the nine Provinces has its own Courts, and from these an appeal lies to the Supreme Court of Canada or to the Judicial Committee at the option of the appellant, but a further appeal from the Supreme Court to the Judicial Committee can (save in Admiralty cases) be brought only by special leave of the Judicial Committee, and the Supreme Court itself has no power to grant such leave.

The Commonwealth of Australia has six States, each having its own Courts with a High Court of appeal for the whole Commonwealth. There is a right of appeal from the State Courts direct to the Judicial Committee or to the High Court, but no further appeal from the latter without special leave from the Judicial Committee. So far, the arrangements are very similar to those of Canada, but by the Commonwealth Act of 1900 the Royal Prerogative to receive appeals was restricted by a provision that no appeal should lie from the High Court to the Judicial Committee on any question as to the limits *inter se* of the constitutional powers of the Commonwealth and any State or States or of the constitutional powers of any two or more States, unless the High Court certifies that the question should be determined by the Judicial Committee. This provision limits the power of the Judicial Committee to interpret the Australian constitution, and in effect removes constitutional questions from its cognizance. The working of this restriction has not been altogether happy. On leave granted by the Supreme Court of Victoria, the Judicial Committee in *Webb v. Outrim* [1907] A. C. 81, disagreed with the view taken by the High Court in *Deakin v. Webb* (1904) 1 C. L. R. 585, but in *Baxter v. Commissioner of Taxation* (1907) 4 C. L. R. 1087, the High Court reaffirmed its previous decision; and by an Australian Act of 1907, in order to obviate any recourse to the Judicial Committee without the leave of the High Court, it was

enacted that the Supreme Court should not pronounce any decision on constitutional cases of the class already indicated. So far, the High Court has granted leave to appeal to the Judicial Committee in only one case—*Att.-Gen. for Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.* [1914] A. C. 237.

South Africa has one Supreme Court for the whole Union with separate divisions for each of its four Provinces. An Appellate Division hears appeals from these Provincial Divisions. There is no right of appeal direct to the Judicial Committee from the Provincial Divisions, and from the Appellate Division appeals lie only by special leave of the Judicial Committee.

New Zealand and *Newfoundland* are unitary Dominions—consisting of one State only. In New Zealand, there is a Supreme Court and a Court of Appeal: appeals lie to the Judicial Committee from the latter; which can admit appeals when the amount in dispute is over £500, or when in its opinion the case ought to be taken to the Judicial Committee. Newfoundland has similar arrangements.

India provides the great majority of the appeals before the Judicial Committee. There is a High Court for each Province (Assam goes with Bengal, and Orissa with Bihar), but it is not always called by that name. There is no Supreme Court for the whole of India; though there is now a Federal Court which may in the future be given jurisdiction in ordinary cases to act as a Court of Appeal from the High Courts. At present, its functions are limited to constitutional questions; it is only beginning to hear its first case this month (October, 1938). The ordinary limit of value which is recognized as entitling an appellant to come to the Judicial Committee is 10,000 rupees as already stated.

You will see from this that in some cases the appellant has a right to come to the King in Council; in some cases he cannot be allowed so to do because the prerogative has been restricted by a statute to which His Majesty has assented; but that in many cases it is a matter for discretion in the exercise of the prerogative. On this, it will be best to read to you a passage or two from Lord Haldane's statement in *Hull v. McKenna* [1926] Ir. R. 402, 404-5:—

'It is obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it has been laid down so strictly that it is only in most exceptional cases that the Sovereign is advised to intervene. In other cases,

the practice which has grown up, or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if, in their Lordships' opinion, the question is one that can best be determined on the spot, then the Sovereign is not as a rule advised to intervene; nor is he advised to intervene normally—I am not laying down precise rules now, but I am laying down the general principles—unless the case is one involving some great principle or is of some very wide public interest. It is also necessary to keep a certain discretion, because when you are dealing with the Dominions you find that they differ very much. . . . It is obvious that the Dominions may differ in a certain sense among themselves. For instance, in India leave to appeal is more freely given than elsewhere, but the genesis of that is the requirements of India, and the desire of the people in India. In South Africa, we take the general sense of that Dominion into account, and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please. We go upon the principles of autonomy on this question of exercising the discretion as to granting leave to appeal. It is within the Sovereign's power, but the Sovereign, looking at the matter, exercises this discretion.'

The above is perhaps a benevolent view of the activities of the Committee. A less friendly critic might reflect that the demands of unsuccessful litigants, of the legal profession, of the Government or Governments and the desire of the people—in India or elsewhere—may be widely discrepant and in some cases difficult to ascertain. There is room, moreover, for some doubt whether principles of autonomy are judicial principles. No doubt, however, it is possible to take the general sense of a Dominion into account in the sense of being more slow or less slow to interfere. That there is no Court in India supreme over the whole of British India in ordinary cases, that South Africa follows the Roman-Dutch law and provides for no appeal to His Majesty apart from special leave obtained in England—such facts as these mark broad differences between one country and another in the matter of applications for leave to appeal.

Here I would draw your attention to two important principles which guide the Committee. The first is that while His Majesty's prerogative extends to criminal as well as to civil cases, the Judicial Committee will not act as a mere Court of Criminal Appeal. In criminal cases His Majesty will be advised to interfere only if the case satisfies what is sometimes called the

rule in *Dillett's Case* (1887) 12 App. Cas. 459, 467, where Lord Watson said that 'the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done'. Subsequent cases have stated and restated the rule in somewhat varying forms to suit particular sets of facts. A large number of applications for special leave are made by persons condemned to death in India for murder whose cases cannot on any view be supposed to satisfy this condition.

The second principle applies to civil cases from Canada and Australia. As already noticed the dissatisfied litigant has, in many cases, a choice of appeal either directly to the Supreme or High Court on the one hand or to the Judicial Committee on the other. Where in such a case the applicant for special leave has chosen the former course, he will not readily be allowed to appeal to His Majesty in Council if the Supreme or High Court has found against him (*Victorian Railway Commissioners v. Brown* [1906] A. C. 381 (Australia), following *Clergue v. Murray* [1903] A. C. 521 (Canada)).

Leave can be obtained to appeal *in forma pauperis*. When it is considered what risk this involves of injustice to the person who has succeeded before the Courts in India or elsewhere overseas, the grant of this privilege would seem to call for the greatest care rather than for what is sometimes called 'liberality'. Apart from such leave or other special order, security has always to be given by the appellant for the costs of an appeal—usually in the sum of £400 or a similar sum, *e.g.* in India 4,000 rupees.

If, then, we may assume that a particular appellant has obtained a certificate from the Court overseas or special leave from the King in Council, the next step is that his petition of appeal is referred to the Judicial Committee for report. Before 1908, a general order of reference used to be made in November of each year, but by the Appellate Jurisdiction Act, 1908, a general order can be made which stands until it is rescinded. Such an Order in Council was made on October 18, 1909, and is still in force.

Of the steps preparatory to the hearing, I will not trouble you with those which concern the mere preparation of the printed record, but of interest to barristers is the preparation

of the 'case' or short statement of the contentions of each party—frequently a most useful and accurate summary of the evidence and of the proceedings in the Courts overseas.

The hearing of an appeal before the Committee is technically by way of a 're-hearing'—in the same way as in the Court of Appeal. There is no question of the old limitation to 'error on the face of the record'. Of course, the evidence is not heard over again, but is printed for the use of the Board. Usually, either three or five judges are sitting. Between 1833 and 1844, four judges were a quorum but the statute of 1844 reduced this to three (not including the Lord President (1851) 14 & 15 Vict. c. 83).

Till some years ago the judges used to sit at the sides of an oblong table—not facing the bar but facing each other. This was a highly inconvenient arrangement. At the top end used to be a vacant place which was theoretically for the King—not a vacant chair as you might collect from Lord Haldane's address in 1921. Nowadays, the judges sit at a table in shape like a horse-shoe and face the bar—like any other tribunal. Neither chair nor place is now reserved for the King. As they are sitting as a Committee of Privy Councillors, the judges do not wear robes or wigs, but the practitioners appearing at the Bar wear the wig and gown usual in English Courts of Law. They need not be members of the English Bar. If they were entitled to a right of audience in the Court from which the appeal is brought they will be heard by the Committee, but they are required to attire themselves in wig and gown. A very experienced counsel in a very new wig is quite frequently to be seen, *e.g.* in appeals from Canada. Nowadays, practitioners come even from India to argue a particular case which they were engaged in before the Courts in India. There are a number of Hindu and Mahomedan barristers resident in London and regularly appearing in cases from India.

One incident of practice before the Judicial Committee might at first strike you as peculiar—at all events if your opportunities of observation have been solely in the ordinary Courts of law. If, for any reason, the judges wish to confer at any length, *e.g.* on the question whether one side or the other should begin, whether a particular point is open for argument, whether it is necessary to call for a reply, the practice is to require counsel and parties to withdraw: everybody has to go out of the room and leave the judges alone.

From the principle that the appeal is to His Majesty's

discretion there has arisen a rule of practice to the effect that the Board will not disturb concurrent findings of fact arrived at by the Courts overseas. This is not a rigid or inflexible rule but strong reason is required to induce the Board to go outside the limits which the rule imposes. The rule does not obtain in the House of Lords, though of course that tribunal would naturally attach the greatest weight to concurrent findings of fact. But questions of fact are, in general, questions upon which Courts with local knowledge of the conditions of life and the habits and customs of the people are peculiarly well fitted to judge. Though they may be of great importance, decisions on questions of fact do not operate as precedents; and questions of principle are generally questions of law.

At the end of the hearing, counsel are generally informed that the Board will take time to consider what advice they will humbly tender to His Majesty, and if counsel on one side has not been called on he is generally told that if the Board find it necessary to hear him he will be given due notice. In simple cases the presiding judge may proceed to state orally the opinion of the Board: it is taken down in shorthand, to be revised and printed later on. Save in such cases, one of the judges prepares a written judgment or statement of the order which they advise His Majesty to make and of the reasons actuating the Committee in giving their advice. ~~Until a few years ago, this judgment~~ used to be read out at the Board on the day fixed for delivery of judgment: now the printed judgment is handed out to the parties in the office and only a short statement of the effect of the judgment is given at the Board itself. An important feature to be noticed about the advice given is that it is the advice of the Board—not of individuals; and if in any case the Board is not unanimous, the only advice tendered at all is that of the majority. His Majesty is not to be troubled with conflicting advice and it is contrary to the duty—and to the oath—of the Privy Councillors that what takes place at the Board should be disclosed, otherwise than in accordance with the practice. The Board has in times past been known to state the fact that it was not unanimous, and even the name of the dissentient (cf. *Cowie v. Remfry* (1846) 5 Moo. P. C. Cas. 232), but an Order in Council of 1878 re-established the present practice as correct.

This feature of the judgment is in marked contrast to the individual speeches in the House of Lords where even the judges who agree as to the result of an appeal may vary in their reasons, with the result that the Courts below may get uncertain guidance.

The Judicial Committee of the Privy Council. 19

The danger in the case of the Judicial Committee is that the Courts, *e.g.* in India, may regard everything in the judgment as equally authoritative with the *ratio decidendi*. But there are cases in which great divergence of judicial opinion has been displayed by Courts overseas and in which it is a special advantage to have an authoritative decision by a Court which does not publish dissenting views and is under no obligation to refute all opinions that differ from its own. It cannot be made too clear that the advice given by the Committee to His Majesty is of a character entirely judicial. As Lord Haldane put it in *Hull v. McKenna* [1926] Ir. R. 402, 403:—

‘We are not Ministers in any sense; we are a Committee of Privy Councillors who are acting in the capacity of Judges, but the peculiarity of the situation is this: It is a long-standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. We have nothing to do with politics or policies, or party considerations; we are really Judges but in form and in name we are the Committee of the Privy Council.’

It has already been noted that though the judgment is only advice to His Majesty, it is made public before it goes to His Majesty. A draft Order in Council is prepared on the basis of the advice tendered and at a meeting of the Privy Council itself (no mere Committee of the Privy Council), held usually in Buckingham Palace, it receives His Majesty’s approval. At this meeting of the Council three or four Privy Councillors are present none of whom is as a rule a member of the Judicial Committee though occasionally members of the Judicial Committee are present as Privy Councillors. This is the meeting of which you read next morning in the papers that His Majesty held a Council and so-and-so attended. The decision of every appeal is thus made by His Majesty and not by the Judicial Committee: it is made, however, by His Majesty in Council. The general form of the Order in Council is that it begins with a recital: ‘Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the day of 19 in the words following *viz.* . . .’ (The words which follow are not the judgment or reasons for the report, but contain after one or more recitals the decision and directions recommended by the Committee. The Order then continues:) ‘His Majesty having taken the said Report into consideration was pleased by and with the advice of his Privy Council to approve thereof and to order as it is hereby ordered

that the same be punctually observed and obeyed and carried into execution. Whereof etc. etc.'

Lord Haldane in his address in 1921 said of the meetings of the Privy Council and the Judicial Committee that when he was at the same time a Minister of the Crown and a member of the Judicial Committee, he 'took care never to attend the one if [he] was going to attend the other, otherwise some acute critic of the constitution might have said, "Ah, yes, the fountains of justice were somehow poisoned by the same man being at both sets of deliberations."' A similar idea can be found in the new edition of Anson's second volume edited by Prof. Berriedale Keith: 'As a matter of form it is the rule that no member of the committee which advises is summoned to the Council at which the order is made' (vol. II, part I, p. 152). I cannot find, however, that there is any such rule, and there seems to be no reason at all why the same man should not be one of the judges in the case and one of the councillors present when His Majesty makes the order in the appeal. As Lord Haldane mentioned, there is no deliberation at the formal meeting at the palace. In Coke's day the Privy Council doubtless justified his description of them as a body which 'like good Centinels and Watchmen consult of and for the publique good and the honour defence safety and profit of the Realm'. But the 'acute critic' may now read that things have changed. 'The Privy Council as such has ceased to be a Council of the Crown. It meets for the purpose of making Orders, issuing Proclamations, or attending at formal acts of state, such as the admission of a minister to his office or the rendering of homage by a bishop for the temporalities of his see. The Cabinet has acquired the place which the Council once held as the adviser of the Crown. Some part of its earlier duties in this respect survive in the Committees of the Privy Council.'¹¹

X Costs are dealt with in a manner special in form if not in substance. The Acts of 1833 and 1844 give the power of awarding costs both of the proceedings before the Committee and in the Courts overseas to the Judicial Committee. The Committee's direction as to costs is not expressed as advice to His Majesty; but it is embodied in their report to the Crown, and it is contingent upon His Majesty's approbation of the report. ('And in case your Majesty should be pleased to approve of this Report their Lordships do direct that there be paid by

¹¹ Anson, vol. ii, pt. i, p. 151, 4th ed.

the Respondents to the Appellant his costs of these consolidated appeals . . .') The Order in Council moreover contains the directions as to costs.

The Order in Council when made is sent overseas to the Court from which the appeal has been brought and it is put into force by direction of that Court, *e.g.* in India by the High Court of the Province. The costs of the proceedings in England are taxed by the Registrar of the Privy Council. In the case of an Indian appeal, these costs, converted into terms of Indian currency and added to any costs incurred in India, are realized by execution in India if this is necessary to give effect to the decision.

Under section 4 of the Act of 1833, the power of the Sovereign to refer matters to the Judicial Committee for advice is exercised on the advice of His Majesty's ministers. As examples of the questions so referred may be mentioned:—whether a certain Member of Parliament had been disabled from sitting and voting in the House of Commons by reason of his connexion with certain Government contracts; what were the rights of the British South Africa Company in the lands of Southern Rhodesia; questions with reference to the boundary between Northern Ireland and the Irish Free State; (by agreement between Canada and Newfoundland) the question which Dominion owns the vast country of Labrador (held in favour of Newfoundland); cases of Colonial judges suspended for alleged misconduct. The decision of the Judicial Committee in such cases has no actual force of law, but it has invariably been acted on by those concerned.

The jurisdiction of the King in Council in Ecclesiastical appeals dates from the Act of Henry VIII passed in 1533, by which appeals to Rome were transferred to the King as Head of the Church of England. These were at first dealt with by a special Commission of Delegates whose functions were transferred to His Majesty in Council in 1832. During Queen Victoria's reign many points of doctrine and ritual were brought before the Judicial Committee, but at the present time the work consists of appeals from sentences of Bishops' Courts depriving clergymen of their livings for bad conduct, and also an occasional appeal about the grant of a faculty. Upon Ecclesiastical appeals, three to five Bishops attend as assessors.

The following table gives the numbers of appeals entered for the last ten years. It includes, therefore, some which did not for one reason or another become effective.

APPEALS ENTERED 1928—1937.

<i>Year.</i>	<i>Indian Courts.</i>	<i>Other Courts.</i>	<i>Total.</i>
1928.	94	39	133
1929.	94	47	141
1930.	81	47	128
1931.	89	47	136
1932.	77	37	114
1933.	64	46	110
1934.	55	49	104
1935.	57	35	92
1936.	81	56	137
1937.	60	25	85
	752	428	1,180
<i>Yearly Average</i>	75	42	118

NOCERE AND NOXA.

(Cui enarrationi de illo quem unum nostrae facultatis et ingenio et iustitia praestantissimum audeo dicere nonnulla praeponam.)

DAVID DAUBE.

IN the year 1908 Professor W. W. Buckland published his book on *The Roman Law of Slavery*. There existed in England, before that time, no Roman legal studies in the modern sense¹; and it is no exaggeration to say that it is he *qui fundavit ius civile*. To-day every scholar in Roman Law or History, whether English or foreign, is acquainted with Buckland's *Equity in Roman Law* (1911), *Elementary Principles of Roman Law* (1912), *Text-Book of Roman Law* (1921, 2nd ed. 1932), *Manual of Roman Law* (1925, reprinted 1928, new edition to appear 1939), and *Main Institutions of Roman Law* (1931), and with Buckland and McNair's *Roman Law and Common Law* (1936).² The Professor's contributions are among the most valuable features of the *Law Quarterly Review*, the *Revue Historique de Droit Français et Étranger*, and several other journals.³ He has received the highest distinctions from

¹ In his Preface to *Slavery* Professor Buckland remarked that he knew of no treatise expounding the principles of the Roman law of slavery as a whole; and that most of the literature he used for questions of detail was foreign. It may now be stated, after more than thirty years, that his book on the subject has not been replaced either in England or elsewhere, and is not likely to be replaced for a long time to come.

² In addition, Professor Buckland completed and edited the second volume of Monro's translation of *The Digest of Justinian* (1909), and corrected and saw through the press E. C. Clark's *History of Roman Private Law, Part III, on the Regal Period* (1919).

³ This is a list of his articles which one hopes will soon be incomplete. Book reviews and memorial notices are not included. (1) *Difficulties of abstract jurisprudence*, *Law Quarterly Review* 1890. (2) *Wardour Street Roman Law*, *L. Q. R.* 1901. (3) *Manumissio vindicta par un fils de famille*, *Nouvelle Revue Historique de Droit Français et Étranger* 1903. (4) *Transfert de la propriété par un esclave*, *N. R. H.* 1908. (5) *Les manumissions prétoriennes*, *N. R. H.* 1908. (6) *More Wardour Street Roman Law: The actio de in rem verso*, *L. Q. R.* 1915. (7) *The Comitial Will*, *L. Q. R.* 1916. (8) *L'intérêt dans l'actio furti en droit classique*, *N. R. H.* 1917. (9) *Mancipatio by a slave*, *L. Q. R.* 1918. (10) *Institutio d'un postumus alienus*, *N. R. H.* 1920. (11) *Did Ulpian use Gaius?* *L. Q. R.* 1922. (12) *Cretio and connected topics*, *Tijdschrift voor Rechtsgeschiedenis* 1922. (13) *F. W. Maitland*, *Cambridge Law Journal* 1923. (14) *Libertus* (G. 3. 56), *Revue Historique de Droit Français et Étranger* 1923. (15) *Interpolations in the Digest*, *Yale Law Journal* 1923-24. (16) *Gaius and the liber singularis regularum*, *L. Q. R.* 1924. (17) *Le Constitut possessoire — animus et corpus*, *R. H.* 1925. (18) *Aestimatum*, *Mélanges Cornil* 1926, and *L. Q. R.* 1927. (19) *Usufruct in classical law*, *L. Q. R.* 1927. (20) *Actio damni iniuriae*, *R. H.* 1927. (21) *Servitudes in Roman Law*, *L. Q. R.* 1928. (22) *Les limites de l'obligation du fideiussor*, *R. H.* 1928. (23) *D. 44. 2. 21. 3*

many universities and other academic institutions, and is recognized by all as the foremost authority in his subject. That he, with all his achievements in the way of original research as well as of masterly interpretation of Roman law as a whole, should have found time to help students and colleagues could hardly be expected. Yet, how many students have been made into lawyers by him; how many colleagues, since the time when 'Mr. Buckland' kept Maitland out of blunders,⁴ have gone to him for advice. He has, in fact, founded a school: a school of Roman law in which, as is obvious to one coming from the Continent, the best methods of English legal thinking are put to use. It is interesting to note that, on the one hand, Professor Buckland has written very little about 'prehistoric' Roman law. The period when law consisted of loose and scattered rules does not particularly attract him. Similarly, the criminal law of Rome is not one of his favourite topics: it does not show (and in his opinion criminal law neither need nor ought to show) a great deal of subtle elaboration. On the other hand, he has again and again attacked the view according to which classical private law was a faultlessly logical edifice, built up quite irrespective of the requirements of every-day life. For him and his school classical Roman law is of lasting value, and worth teaching, because in it exact legal reasoning and common sense are combined in an unequalled manner. As he has shown in a number of publications, the leading Roman jurists, well trained in jurisprudence, logic and rhetoric, and backed by a law-abiding civilized community, did indeed create an admirably coherent system. But, being broad-minded public men, aristocratic in their attitude, dependent neither on Caesar nor on the *plebs*, they never forgot that law, if it is to serve its ultimate purpose, must be a living force, flexible and pro-

and res iudicata, *Mélanges Fournier* 1929. (24) The protection of servitudes, *L. Q. R.* 1930. (25) D. 47. 2 and the methods of the compilers, *Tijdschrift* 1930. (26) *Diligens paterfamilias*, *Studi Bonfante* 1930. (27) *Aestimatum*, *L. Q. R.* 1932. (28) *Culpa and bona fides in the actio ex empto*, *L. Q. R.* 1932. (29) *Exceptio rei residuae* (G. 4. 122), *R. H.* 1932. (30) *Marcian*, *Studi Riccobono* 1932. (31) *Les limites de l'obligation du fideiussor*, *R. H.* 1933. (32) *Casus and Frustration in Roman and Common Law*, *Harvard Law Review* 1933. (33) *L'Edictum Provinciale*, *R. H.* 1934. (34) The duty to take care, *L. Q. R.* 1935. (35) *Finium Regundorum*, *R. H.* 1936. (36) *Classical Roman Law*, ch. xxi in vol. xi (*The Imperial Peace*) of *The Cambridge Ancient History*, 1936. (37) Reflections suggested by the new fragments of Gaius, *Juridical Review* 1936. (38) Gaius and the *liber singularis* again, *L. Q. R.* 1937. (39) Civil proceeding against Ex-Magistrates in the Republic, *Journal of Roman Studies* 1937. (40) Note on the vocabulary of Gaius, *L. Q. R.* 1938. (41) D. 12. 4. 16, *Tijdschrift* 1938. (42) *Praetor and Chancellor*, *Tulane Law Journal* 1939. (43) *Ritual acts and words in Roman law*, *Festschrift Koschaker* 1939.

⁴ See Maitland, Bracton and Azo, *Selden Society*, vol. viii, Introduction, p. xxxiii.

gressive. Is it not clear that both the greatness and the charm of the Professor's work are due to the fact that his temperament is so similar to that of the illustrious men of the past about whom he writes? It is sometimes said, and probably rightly, that a man may possess any amount of knowledge and judgment, but he will not be a true historian unless he feels in himself something of the spirit of the time with which he is dealing. Professor Buckland is a true historian: and it is precisely for this reason that he has always refused to erect into an absolute dogma any one of the different methods at the disposal of the modern critic. He does, of course, use them. But he uses them with care, leaving the sources to speak the last word. He teaches that, in history, to simplify is to do violence to the documents which reflect ideas too manifold to admit of schematic treatment. His famous, and successful, struggle with the 'interpolationists' (who, if a certain word, figure or notion appears to be popular with the Byzantines, regard it as an infallible criterion against better evidence, and reject or alter classical texts accordingly) is only one illustration of this attitude. No less significant, *e.g.*, is the way he describes the fundamental concepts of Roman law, and how they work, with all their ramifications and fine inconsistencies; no less significant his weighing against each other, in tracing the development of a particular institution, the forces of tradition and reform, system and practical necessity, milieu and personality; no less significant his reserve in estimating the role played in Roman legal growth by Greek and oriental law, and in dating such importations as there exist. His influence, direct and indirect, is too far-reaching to be assessable at the present time. It certainly extends much beyond the sphere of Roman law proper,⁵ and, it is safe to say, beyond the sphere of law. The Registrar of Births tells us, what otherwise we would not believe, that the Professor will be eighty this year. It may be appropriate, on this occasion, to make a few supplementary remarks on a subject about which everything essential is said in his first work.⁶

⁵ Four at least of his books must here be cited. The comparative lawyer appears in two which have already been mentioned. *Equity in Roman Law* (1911), and *Roman Law and Common Law* (1936) by Buckland and McNair; the Medievalist in *Glossators of the Roman Law* (1938) by H. Kantorowicz in collaboration with Buckland; and the modern lawyer in the second edition of G. B. Finch's *Selection of Cases on the English Law of Contract* (1896) by R. T. Wright and Buckland.

⁶ See the chapter on Delicts by Slaves in *The Roman Law of Slavery*, pp. 98 *et seq.* As the only part of the subject which, for reasons stated above, the Professor has not exhausted is the early, conjectural period, the following pages must mainly be devoted to pre-classical law.

Up to some years ago it was generally assumed, on the authority of Mommsen, that the word *nox* in technical language denotes only that case where it is not the wrongdoer himself, but his master who has to bear the legal responsibility for the wrong done.⁷ This theory, however, has lost some adherents since De Visscher combated it in several most interesting articles. According to him there is nothing to show that the term is confined to indirect liability: it is used, in his opinion, no matter whether the action lies against the wrongdoer's master or the wrongdoer himself. But, at the same time, he introduces a new restriction. Originally, he says, and for a long period, the word *nox* refers exclusively to delicts against a person's property, as opposed to *vindicta* which refers to delicts against a person's body.⁸ It seems to me that neither of the two parties has quite solved the problem. Essentially the way in which they argue is the same: they both adduce a number of passages where *nox* occurs in connexion with this or that specific kind of delict; they both infer that this or that specific kind of delict is the proper domain of the term; and they both declare that other applications are irregular, late and lax. As a result, of course, text stands against text. I believe that a somewhat different method may lead to conclusions nearer the truth, if less definite. We must not, I think, take it for granted that *nox*, in ancient times, had a very narrow sense which was only extended later. Even if we find that the term signifies the same type of delict in a whole series of early provisions, it does not necessarily follow that this is the only original and strict signification. Before making an assumption of this kind, we have to ask whether the uniform use of the word is actually due to an inherent limitation in its meaning. It may be due to external factors such as the great importance for the lawgiver of a particular type of delict (he does not speak about other, less urgent cases which, however, he regards also as instances of *nox*) or tradition (*nox*, in some provisions, is employed with reference to a particular type of delict, not because it can denote nothing except that type, but simply because it was so used on a previous occasion). The results I shall submit may be summarized as follows: (1) The terms *nocere* and *nox*, from the outset, cover any kind of damage, whether it be the wrongdoer's master or the wrongdoer himself who is made

⁷ See Mommsen, *Römisches Strafrecht*, pp. 8 *et seq.* and Lenel, *Actiones noxales*, *Zeitschrift der Savigny-Stiftung* 1927, p. 26.

⁸ See De Visscher, *Vindicta et noxa*, *Études de Droit Romain*, pp. 111 *et seq.*; *Les origines de l'obligation ex delicto*, *Études*, pp. 285 *et seq.*; and *L'action noxale d'injures*, *Études*, pp. 329 *et seq.*

responsible, whether it be damage to a person's property or to a person's body. (2) In the XII Tables *nocere* and *noxa* are employed only, or at least mostly, in provisions concerning the responsibility of the master for a wrong done by a person or thing in his power. (3) It would, however, be rash to conclude that the terms, in this period, cannot be used where the wrongdoer himself is made responsible. The main reason why, in the code, they happen to occur only in cases of indirect liability is that, of the corresponding cases of direct liability, some give rise to a more severe penalty than a mere *noxiam sarcire*, whilst some are not dealt with at all. In fact, it can be shown that, at the time of the XII Tables as afterwards, *nocere* and *noxa* do signify delicts committed by a fully responsible *paterfamilias*: two *leges Valeriae Horatiae* are positive evidence in this matter. That the terms, in the XII Tables, imply a close physical connexion between act and effect is clear from the language of the law itself: it is not the wrongdoer's master but the person or thing in his power, the direct author of the damage, who is described as *noxiam nocens*. The phrase *noxiam nocere* thus refers, not to the working of a remoter cause, but merely to the actual, immediately harmful deed. (4) Under the influence of the XII Tables the words *nocere* and *noxa* remain predominant in the sphere of noxal actions throughout all periods of Roman law. (5) The terms *nocere* and *noxa* refer to damage to property already in the XII Tables. For certain reasons, however, the *lex Aquilia*, in making known the nature of the delict to fall under the statute, uses not the phrase *noxiam nocere* but *damnum facere*; the *lex* further uses, in specifying the various acts that may constitute the delict, the verbs *occidere*, *urere*, *frangere* and *rumpere*. After that time the terms *nocere* and *noxa* are seldom applied by the jurist to damage to property, save in the field of noxal actions. (6) The terms *nocere* and *noxa* refer to damage to a person's body as early as the period of the XII Tables. Under the regime of the *lex Aquilia*, however, damage to a slave is classed by the jurists not as *noxa* but as *damnum*, save (as stated above) in the field of noxal actions. As regards damage to a free man, the '*edictum generale*', for certain reasons, uses not the terms *nocere* and *noxa*, but *iniuria*. As in classical times the edict covers almost any kind of injury to a free man, the words *nocere* and *noxa* become rare even in this branch of the law: here also they persist mainly where noxal actions or some special archaic provisions are discussed. (7) The view, commonly held by modern writers, that the XII Tables have

no noxal liability in the case of damage to a person's body is based on extremely weak evidence. There is plenty of room for speculation: a verdict of *non liquet* seems safest.

(1) The words *nocere* and *noxa*⁹ are connected with the root *nak*, which indicates vanishing, perishing; it is that root from which, e.g. the word *nox*, night, is derived.¹⁰ The dictionary shows¹¹ that, in pre-classical, classical and post-classical Latin, *nocere* means to injure, to damage, to act wrongfully, *noxa* means injury, damage, wrong. The adjectives *noxius* and *innoxius* mean harmful, guilty of harmful acts, and harmless, guiltless. The words are used, in the earliest and latest sources, quite irrespective of whether the wrongdoer himself, or his master, or nobody at all has to answer for the injurious act. They are used, in the earliest and latest sources, quite irrespective of whether the act is directed against a person's body, or a person's property, or the state, or society, or objects that do not interest the lawyer at all. It follows that, unless very good proofs can be found, we must not regard one of the applications enumerated as older or stricter than another. Certainly, since we are concerned not so much with the meaning of *nocere* and *noxa* in general as with their scope in legal texts, a special problem arises: jurists often use terms, which in colloquial speech have a wide range, in a narrow technical sense. But, again, some proof is surely needed before we are entitled to assume such a technical limitation. We shall see that the words *nocere* and *noxa*, in legal texts, show only the following three distinctive features. First, it is clear that, as legal terms, they never include damage falling completely outside the compass of law. Cato¹² and Columella¹³ speak of corn-worms that *nocent* or cause *noxa*. As legal terms, the words must be confined to damage originating in the sphere of somebody who, at least theoretically, can be made responsible, and caused to somebody whom the law seeks to protect. Secondly, in texts on private law *nocere* and *noxa* as a rule signify only that damage of which the cause can be exactly ascertained (in the case of the *lex Aquilia* this is easiest, according to G. 3. 219, if the damage is *corpore datum*). Cicero says¹⁴ that it is ordained in all states *ut non liceat sui commodi causa nocere alteri*. No

⁹ I shall not, in this article, distinguish between *noxa* and *noxia*.

¹⁰ See A. Vanicek, Griechisch-Lateinisches Etymologisches Wörterbuch, vol. i, pp. 423 *et seq.*

¹¹ Lewis and Short, 1927.

¹² De Agri Cultura 92.

¹³ De Re Rustica 1. 6. 15.

¹⁴ De Officiis 3. 5. 23.

provision of private law, whose aim it is to establish the responsibility of a person for definite acts, can use *nocere* in this all-embracing ideal sense. It may be noted, however, that we do find a rather wide meaning of *nocere* and *noxa* in the domain of political crimes, where the requirement of a straight physical connexion between cause and effect would obviously be absurd. Thirdly, under the influence of the XII Tables the words *nocere* and *noxa* remain for ever predominant in delicts committed by persons in *potestas*. Since, through the *lex Aquilia*, the terms *damnum*, *rumpere*, etc., become usual in damage by a *paterfamilias* to a person's property, and since, through the '*edictum generale*', *iniuria* becomes usual in damage by a *paterfamilias* to a person's body, there is, in classical times, little room left for *nocere* and *noxa* outside noxal actions. The terms are now, in a way, technical: but never so technical that they cannot be used as denoting delicts by the *paterfamilias* himself. Except for these three points, *nocere* and *noxa* are applied by the lawyers in exactly the same manner as they are in extra-legal literature: they cover any kind of harm.

One question may here be considered. It is easily understandable, after what has been said, that from early times theft is classed as a case of *noxa*. But why is it that in some texts theft and *noxa* are contrasted? If I look upon theft from the point of view of the victim, the term *noxa* seems perfectly suitable: his property is affected, he is wronged, and under certain circumstances the person responsible must make good the damage, must *noxiam sarcire*.¹⁵ If, however, I consider the act of stealing as such, if I consider what the thief does to the object he steals, I cannot very well speak of a *nocere*: the thief does not really damage the thing, he simply takes it away, *fert*. Thus, in describing the actual operations performed by a malicious slave, the XII Tables separate *furtum* and *noxa*: *si servus furtum faxit noxiamve noxit*.¹⁶ As far as the linguistic side is concerned, there is nothing exceptional, nothing technical in this separation. The *lex de Gallia Cisalpina* offers another

¹⁵ E.g., VIII 14 of the XII Tables.

¹⁶ XII 2. In D. 9. 4. 2. 1 we are told by Ulpian what Celsus thinks about the case where *servus sciente domino furtum fecit vel aliam noxam commisit*. The clause *furtum . . . commisit* is evidently modelled after XII 2, and yet *furtum* is represented as one of several possibilities of *noxa*. This divergence seems to result from the fact that, with Celsus and Ulpian, the emphasis lies not on the concrete acts performed by the slave, but on the attitude of his owner: the owner consents that his slave commits a delict, a *noxa*, be it *furtum* or any *alia noxa*. Possibly it is more than accidental in this connexion that the vivid expression of XII 2, *noxiam nocere*, to damage a damage, is replaced in 9. 4. 2. 1 by the general *noxam committere*.

illustration, if indeed the distinction made in 22. 11. 32/33 is, as De Visscher suggests,¹⁷ between *furtum* on the one hand and the remaining delicts, as cases of *noxa*, on the other hand. In this *lex* also the reference is to what has actually been done by the delinquent: he admits (by *confessio in iure*) *eamve rem de qua arguetur se fecisse obligatumve se eius rei* (namely, according to De Visscher, *furti noxiae esse*).

(2) In the XII Tables, the words *nocere* and *noxa* appear to have occurred in provisions about the nocturnal cutting of another's crops by an *impubes* (VIII 9); *furtum manifestum* by an *impubes* (VIII 14); *furtum*, which we have probably to interpret as comprising only such kinds of theft as are not manifest, and other damage by a slave, and, we may perhaps add, by a *filiusfamilias* (XII 2); and damage done by quadrupeds (VIII 6). As Mommsen has pointed out, these are all cases where the *paterfamilias* is responsible for a person or thing in his power.¹⁸ There remain the provisions about *aqua pluvia* (VII 8) and accidental fire (VIII 10). It seems to me that in these delicts also the idea of the responsibility of the *paterfamilias* for beings in his power plays an important part. In ancient times, water and fire are regarded as autonomous forces, similar in this sense to quadrupeds. Very naturally, in law, this conception disappears first where water and fire are evidently mere instruments used by man; that is to say, where the crime is intentional (a man drowns another, a man deliberately sets fire to a house). It persists longest where, as in *aqua pluvia* or accidental fire, the damage is quite unexpected as if freely caused by the elements. But we need not base ourselves merely on these general reflections. First of all, it must be noted that according to the XII Tables, in unintentional homicide *telum manu fugit magis quam iecit*.¹⁹ In general, a weapon is considered less independent than water or fire: and yet the code says that, in the absence of human criminal intent, the deed is, to some extent, to be ascribed to the weapon. Surely a lawgiver who construes unintentional homicide in this way is not likely to take a very advanced view of *aqua pluvia* and accidental fire. Secondly, as regards *aqua pluvia*, the language of the XII Tables itself suggests

¹⁷ *Op. cit.* pp. 284 *et seq.*

¹⁸ De Visscher, *op. cit.* p. 286, n. 3, takes a different view; he says that an *impubes* is not necessarily *alieni iuris*. But it is highly probable, I should think, that the XII Tables, when speaking of an *impubes*, mean the normal case where he does have a father. The point does not affect the main line of my argument.

¹⁹ VIII 24.

that the *aqua* is the actual wrongdoer. The provision in question begins *si aqua pluvia nocet*: it is the *aqua*, not the person behind it, that does the damage. We have to remember, moreover, that even in the classical period the *actio aquae pluviae arcendae* lies, not against him through whose work the damage arises, but against the owner of the land on which the work is done: a feature which can best be explained as a remnant of the time when the responsibility of the defendant in this action was not for a delict of his own but for one committed by a thing in his domain. Thirdly, in the law relating to accidental fire, we can find traces of the old conception of fire as a dangerously self-willed being up to the end of the classical era. The phrase *fortuitum incendium* is used in many texts: *fortuitum*, derived from *fors*, suggests something ungovernable, unforeseeable. Accidental fires are vividly depicted as passing out of the power of man and doing damage themselves, independently.²⁰ Leaving aside terminology and style, it is well known with what difficulties the classics subsume under the Aquilian liability some cases of accidental fire: amongst them precisely that case which, in all probability, was the example mentioned in the XII Tables,²¹ the case where I make a fire on my field which spreads to my neighbour's land.²² Here, in earlier ages, the element, escaping control, must have been deemed the principal agent. It seems safe to conclude that the authors of the XII Tables would readily have agreed with Pliny's remark on fire²³: *cum sit huius unius elementi ratio fecunda seque ipsa pariat et minimis crescat a scintillis*.

(3) If, then, all the extant rules of the XII Tables that contain *nocere* or *noxa* are concerned with the responsibility of a man, less for what he does than for what is done by persons or things in his power, does it follow that the terms as such imply the presence, behind the actual but irresponsible wrong-

²⁰ *Fortuita incendia quae evadunt*, Coll. 12. 2. 2 and Paul 5. 20. 3. *Si stipulam incenderis ignisque evagatus ad praedium pervenerit et illud exusserit*, Coll. 12. 7. 4. *Si stipulam incenditis ignis effugerit* (compare the above cited *si telum manu fugit*) *in factum agendum, quia non principaliter hic exussit sed, dum aliud egit, sic ignis processit*, Coll. 12. 7. 5.

²¹ I cannot here justify this assumption at length: suffice it to advance some points. (1) Gaius in D. 47. 9. 9 no doubt gives a highly modernized version of the old rules. (2) The field case is again and again discussed in legal writings: it is an ancient, traditional problem. (3) The field case occurs as the typical example of accidental fire in other ancient systems. See, on Germanic law, v. Amira, *Nordgermanisches Obligationenrecht*, vol. i, pp. 388 *et seq.* and vol. ii, pp. 408 and 866; and as for Hebrew law, Exodus 22. 5. (4) In classical texts, a second type of accidental fire is frequent: the fire in an *insula*. It is dealt with on much more modern lines. The chief reason is that it did not become important till Rome was a real city.

²² Comp. e.g. Coll. 12. 7. 4 *et seq.* partly quoted in note 20.

²³ *Naturalis Historia* 2. 107 (111). 239.

doer, of a remoter but responsible master? Certainly not. But why do they occur only in those remarkable provisions? Chiefly because the lawgiver has no opportunity of using them in any others: delicts by the *paterfamilias* himself are, roughly speaking, either considered too serious to be made good by a mere *noxiam sarcire*, or are not mentioned in the code at all. The nocturnal cutting of another's crops by the *paterfamilias* himself, *furtum manifestum* by the *paterfamilias*, and arson (where it is the guilty person, not the fire, whom the jurists regard as doing the wrong²⁴) are all capital crimes. The culprit is not let off with *noxiam sarcire*: which does not mean that these offences do not come under the notion of *noxa*. Similarly, the case of a *paterfamilias* injuring a person's body does constitute a *noxa*. The word is not applied in this connexion because the code enumerates a few specific kinds of injury, such as *membrum ruptum* and *os fractum*, and instead of providing that the *noxa* is to be restored, allows retaliation, recommends pact, or lays down fixed penalties in money. As for simple damage by a *paterfamilias* to another's goods, this delict is not dealt with in the XII Tables at all.²⁵ It might, perhaps, be argued that there were rules about it, which are lost. But most probably there were not. Ancient codes give regulations only in those matters where the law is doubtful, or where a reform is at once needed and practicable.²⁶ In Exodus 21. 1—23. 19, *e.g.*, we also find that there is no provision relating to direct damage to property: only the problematic cases of damage by animals,²⁷ by accidental fire²⁸ and by an open pit²⁹ are brought up. Even the *lex Aquilia*, some two hundred years after the XII Tables, deals only with one particular section of damage to property, namely, damage to *res se moventes*. It must be observed, moreover, that in the classical writings on this *lex* very little is said to establish the responsibility of a *paterfamilias* in case he directly destroys another's property: the position is so clear. The reason, therefore, why the XII Tables do not describe this delict as *noxa* is that they give no description of it whatever. It is superfluous for the lawgiver to speak about it: everybody knows that, in this case,

²⁴ Comp. above, p. 31.

²⁵ Some very special cases only are mentioned, the nocturnal cutting of another's crops, the cutting down of another's tree, etc.

²⁶ Modern codes usually try to be complete: they are made by conscientious scholars; the principle *nulla poena sine lege* is transplanted into private law; and perfect systems are popular in a rationalistic age.

²⁷ 21. 35 *et seq.*, 22. 4.

²⁸ 22. 5. It is the field case: see above, p. 31, n. 22.

²⁹ 21. 33 *et seq.*

restitution has to be made.³⁰ There remain the delicts of *furtum nec manifestum*, *conceptum* and *oblatum* by a *paterfamilias*. On these the code did have provisions, but the exact wording is not preserved. It is generally supposed, on the basis of G. 4. 37 (*formula ficticia* in *furtum* by a peregrine) and table XII 3 (*vindicia falsa*), that the thief must *damnum decidere*.³¹ This may be so, but there is no certainty. Some phrase containing the word *poena*, or the phrase *noxiam sarcire*, is equally likely: *poena* is used by Gaius as well as by Gellius in referring to this part of the XII Tables,³² *noxia* occurs in the *furta* of VIII 9 and 14. We do not know.

As is clear from the foregoing remarks, the fact that *nocere* and *noxa* in the XII Tables are not used of delicts by the *paterfamilias* himself³³ can easily be accounted for by external circumstances, which have nothing to do with the meaning of the terms as such. Actually, there are definite signs that the terms, in this period as later, do include cases of direct liability. Before, however, substantiating this statement, I have to say that by direct liability I mean two things. I mean the liability of a *paterfamilias* for his own acts (as opposed to acts done by beings in his power), and the liability for acts that immediately—*corpore suo*, in the language of Gaius—produce the wrongful result (as opposed to acts that lead to the result through an intervening medium). These two kinds of direct liability, and of course the corresponding two kinds of indirect liability, are, theoretically, quite different: and Mommsen excepts only the first (liability of a *paterfamilias* for his own acts) from the category of *noxa*, without commenting upon the second. But, as it is, their domains in the history of law may overlap, and it is necessary, therefore, to consider both of them. The general problem, for the *decemviri*, appears to have been not so much how far a man is answerable for a wrong even where he sets merely a remote cause in motion (instead of damaging *corpore suo*), as how far he is answerable even where it is committed by another being, so long as that being belongs to his sphere of power. This idea, the idea that a man may be answerable for delicts committed by somebody else, is to be found in its

³⁰ Some sort of liability must have existed, seeing that liability existed even where the damage was done by son, slave or quadruped. That restitution was customary rather than vengeance may be inferred from the fact that even in damage to a person's body retaliation was no longer predominant.

³¹ See Lenel, *Edictum Perpetuum*, 3rd ed. p. 328.

³² G. 3. 190 *et seq.*; Gellius, *Noctes Atticae* 11. 18. 15.

³³ The words may well have occurred in *furtum* by the *paterfamilias*. But I shall disregard this possibility; which would form too insecure a basis for the following argument.

purest form in the provisions about delicts by sons and slaves; and it may be noted that, in this branch of the law, it remained unchallenged even in classical times.³⁴ It is very probably combined, however, with the idea of remote causality in the provisions about *aqua pluvia* and accidental fire.³⁵ Water and fire, though independent in a sense, obviously do not possess the intelligence of sons or slaves.³⁶ The person behind them, *qua* ultimate cause of the damage, cannot be completely neglected: and, in classical times, damage by fire at least was exclusively dealt with as a case of nearer or remoter causality. Midway between damage by sons and slaves and damage by water and fire stands *pauperies*. But it seems that, fundamentally, the principles governing *pauperies* were always much the same as those governing damage by sons and slaves: both the classics and Justinian made the owner of the animal responsible as owner, for damage caused by the animal, not for having caused damage himself.³⁷

Now it is certainly very admirable that the idea of the *paterfamilias*' responsibility for wrongdoers under his rule should already be applied, with great skill, by the authors of the XII Tables. But to assume that there exists, in their age, a technical term denoting just this type of responsibility is expecting too much. That *nocere* and *noxa* are used no matter whether the wrongdoer's master or the wrongdoer himself has to bear the responsibility is evidenced, above all, by two *leges Valeriae Horatiae*, dating from 449 B.C.³⁸: the one providing that whoever should create a magistrate *sine provocatione* might be put to death, *neve ea caedes capitalis noxae haberetur*; the other that *qui tribunus plebis aedilibus iudicibus decemviris nocuisset, eius caput Iovi sacrum esset*. There is hardly any

³⁴ The Aquilian theory of remote causality did not penetrate into this field. As, on the one hand, sons and slaves had nothing wherewith to pay, and, on the other hand, they committed the same delicts as a *paterfamilias*, the system of the absolute duty of the latter (*i.e.* duty existing no matter whether or not he could be regarded as a cause of the wrong in question) either to make amends or to surrender the culprit was by far the best.

³⁵ The provision relating to *pastus pecoris* (VIII 7), which may also have contained the expression *noxiam sarcire*, must, I believe, here be added. In this case, as distinct from *pauperies*, the animal acts under the control of man rather than as a self-determining being.

³⁶ Moreover, *noxae deditio* was never possible in these cases. That there was, however, some sort of *noxae deditio* in ancient systems if a weapon had done damage, is well known.

³⁷ On the question whether *pauperies* gave rise to a noxal action in classical time, see Lenel, *Actiones noxales*, *Zeitschrift der Savigny-Stiftung*, 1927, pp. 2 *et seq.*

³⁸ Livy 3. 55. 5 and 7. It is true that Livy may be inaccurate. But there is no reason to trust him less than those writers from whom we learn about *noxa* in the XII Tables.

need to point out that these laws refer primarily to acts done by a fully responsible *paterfamilias*. It should further be observed that even the classics, who analyse and elaborate the noxal actions to the last detail, speak of *nocere* and *noxa* in a number of delicts by the *paterfamilias* himself. They never give us to understand that this application of the terms is in any way inaccurate. In fact, several definitions of *noxa* are preserved, in none of which the slightest suggestion is made that the word as such implies indirect responsibility.³⁹ Mommsen says⁴⁰ that, originally and always in strict language, the adjective *noxius* means not 'he who has done a wrong' but 'he who is to be noxally surrendered by the responsible person'. No doubt the word, in the Empire, does frequently occur in the latter sense: I shall advert to this point below. Suetonius in particular (the only evidence Mommsen adduces) sometimes calls *noxius* the slave who is condemned to fight with wild beasts.⁴¹ But it is difficult to see why this signification should be older than others, or even why it should be the only 'strict' one in the literature of the Empire. In Plautus, the husband whose escapades have come to his wife's notice is treated by her *pro noxio*.⁴² Cicero uses *noxius* or *innoxius* with reference to delicts by free citizens in De Legibus 3. 3. 6,⁴³ where he distinctly affects the archaic language of statutes. Livy tells us that the praetor who prosecuted the Bacchanalian conspirators *multos qui aut citati non adfuerant aut vades deseruerant noxios iudicavit*.⁴⁴ These examples could be multiplied. Considering most of them are much later than the XII Tables, thus dating from a time when the characteristics of noxal *iudicia* were fully grasped by the lawyers, it emerges once more that the terms *nocere* and *noxa*, in 450 B.C., must be far from technical: they signify, not only the delict for which a person other than the wrongdoer is legally responsible, but also the delict committed by the *paterfamilias* himself.

It remains to mention a few facts making it clear that *nocere* and *noxa* cover also the second kind of direct liability, that is to say, liability for acts directly (*corpore corpori*) causing

³⁹ See below, p. 36.

⁴⁰ Op. cit. p. 9.

⁴¹ Caligula, 27. 1 and Nero 12. 1. But the word seems to have the wide meaning of 'criminal' in Claudius 34. 1 and Vitellius 17. 1.

⁴² Mercator 724. An example of *obnoxius* is to be found in Truculentus 834. Diniarchus confesses himself *obnoxius*, whereupon Callicles proposes to go to law: evidently, Diniarchus is thought of as *sui iuris*.

⁴³ *Magistratus nec oboedientem et innoxium* (see Mommsen, op. cit. p. 38, n. 1; others read *noxium*) *civem multa vinculis verberibusque coerceto*.

⁴⁴ 39. 41. 7.

the damage. In this matter the very language of the XII Tables should preclude any doubt. It is the immediate, physical author of the damage alone of whom the code says *nocet: si servus* (not: *paterfamilias per servum*) *noxiam noxit* in XII 2, *si aqua pluvia* (not: the owner of the land on which the work is done) *nocet* in VII 8.⁴⁵ There is nothing to show that *nocere* alludes to a remoter cause working behind the actual wrongdoer. Indeed, as has already been stated,⁴⁶ *nocere* and *noxa*, whilst denoting in ordinary language all acts that in some way and at some time produce harmful results, as terms of private law necessarily imply a closer connexion between cause and effect. The XII Tables, when speaking of a slave who *noxiam noxit*, do not use *nocere* in that wide sense in which Cicero uses it when he condemns a *sui commodi causa nocere alteri*: they mean a fairly straightforward delict. Certainly, in cases like *aqua pluvia* or accidental fire the most primitive lawyers (and the XII Tables are by no means primitive) must have felt that the element is not the only cause of the damage, the only *nocens*, but that the person behind it also contributes to produce the *noxa*: and the fact that this idea is not actually expressed in the XII Tables (where the person is answerable as author of the damage less than as the wrongdoer's master) is no proof that it does not exist. But for one thing, even in these cases act (a man makes a fire on his field) and consequences (the fire destroys his neighbour's property) are not too widely separated; and for another thing, it is a far cry from recognizing some prominent instances of remote causality to consciously using one definite noun, *noxa*, and one definite verb, *nocere*, for all cases of remote causality and no others. In point of fact, it was not before the great interpreters of the *lex Aquilia* set to work that what may be called a theory of causality was created. It is significant that even then the jurists, in distinguishing indirect from direct causality, did not employ the terms *nocere* and *noxa*, but coined expressions such as *causam mortis praestare*, *non corpore suo damnum dare*: even then *nocere* and *noxa* were used of direct damage just as much as of indirect damage.

(4) *Nocere* and *noxa*, in the XII Tables, are not technical: the words as such do not suggest that the wrongdoer's master,

⁴⁵ The constant interpretation by praetor and jurists of *noxiam nocere* as 'actually to commit a delict' may conceivably be one of the reasons why even in classical law a *paterfamilias* was noxally liable only for the real wrongdoing of a person in *potestas* (see Buckland, *Slavery*, p. 101); but not, e.g., where a person in *potestas* occupied a house from which something was thrown.

⁴⁶ See p. 28.

not the wrongdoer himself, has to bear the legal responsibility for the offence committed. It is only natural, however, that, for the interpreters of the code, of all the provisions containing *nocere* or *noxa* those which related to delicts by sons, slaves or quadrupeds were the most striking. The system under which a *paterfamilias* had either to make good the damage or to surrender the wrongdoer⁴⁷ was regarded, rightly, as at once ingenious and useful. It was maintained, up to the end of the classical period, in most of the cases for which it had been established by the XII Tables, and was extended to many others. Now and then the principle of noxal liability was applied even in international conflicts, not always without some sophistry.⁴⁸ With the system remained the terms *nocere* and *noxa*. Whilst giving way to *damnum*, *occidere*, *rumpere* in damage by a *paterfamilias* to another's property, and to *iniuria* in damage by a *paterfamilias* to another's body, in delicts by sons, slaves and animals *nocere* and *noxa* continued to be predominant. It is true that even in this field *damnum* and *iniuria* were not infrequently used: where it was a question of going into the particular wrong done by a son or slave, of course *damnum*, falling under the *lex Aquilia*, *iniuria*, falling under the edict, and other cases had to be distinguished. But in discussing delicts by persons in *potestas* or quadrupeds as a separate group, with rules differing from those in delicts by the *paterfamilias* himself, the jurists adhered to *nocere* and *noxa*. Thus *nocere* and *noxa* persisted especially in phrases that from of old referred to the outstanding feature of noxal liability, the possibility of surrender: *noxae deditio*, *noxa caput sequitur*, *noxa solutus*, and so on.⁴⁹ In fact, a new adjective was coined by the lawyers, probably some time before or about the begin-

⁴⁷ The question what was the exact relation between these alternatives need not here be considered.

⁴⁸ The oldest case recorded (320 B.C.) is in Livy 9. 10. 9. The leaders of the Roman army had made an undesirable treaty with the Samnites. It was argued by the Romans that the treaty, concluded against the will of the people, was not absolutely binding, and that the Samnites must be content with having the leaders surrendered. These were offered by the fetial with the words: *Quandoque hisce homines iniussu populi Romani Quiritium foedus ictum iri spoponderunt etque ob eam rem noxam nocuerunt, ob eam rem quo populus Romanus scelere impio sit solutus, hosce homines vobis dedo*. It would seem that the formula, at that time, was not yet a genuine common piece of international custom; that it was made up by the pontiffs *ad hoc*, an artificial imitation of less solemn acts of private law; and that it was a cheat. But, as is well known, the precedent was followed on several subsequent occasions.

⁴⁹ Even metaphorical applications are to be found, e.g. Livy 26. 29. 4 (the Sicilians do not want to be 'noxally surrendered' to the terrible Marcellus) and Columella 1 praef. (*rem rusticam pessimo cuique servorum, velut carnifici noxae dedimus*).

ning of the Principate, derived from *noxā*, *noxalis*, to denote what was connected with noxal liability.⁵⁰

It follows that, so far as the classical period is concerned, Mommsen is, in a measure, right: *nocere* and *noxā* now were preferably employed in noxal *iudicia*, and so, no doubt, was the old adjective *noxius*. Two points, however, must be emphasized. First, this deliberately technical use of *nocere*, *noxā* and *noxius* is not to be regarded as the original use. It was, on the contrary, the result of a long development involving careful examination, elaboration and distinction from other institutions of noxal liability; a development whose completion is marked, one may say, by the appearance of the adjective *noxalis*, which includes all cases of noxal liability and nothing but them. Secondly, even in the classical period this technical use was not the only strict one. Setting aside extra-legal literature where, as might be expected, *nocere* and *noxā* now as before signified any type of delict (and non-delictal damage as well): the jurists themselves did not hesitate to apply the words wherever, for some reason or other, they seemed to fit. If *nocere*, under the influence of the XII Tables, remained in noxal liability, it also remained, under the same influence, in *aqua pluvia*.¹ *Nocere* occurred in three edicts, to be considered below,² which dealt with behaviour dangerous to the public, and it was used by early and late classics in their comments upon these rules. Above all, *noxā* throughout all periods of Roman law served as a general term, in the sense of *delictum*, with no special reference to noxal liability: it served, that is, as a term comprising the various wrongs, *furtum*, *damnum*, *iniuria* and so forth,³ and simply meaning 'wrong'. Clearly, as a general term it could not be superseded by *damnum* and *iniuria*: these words took its place only where the specific delicts of the *lex Aquilia* and the '*edictum generale*' were under notice. Three quotations may suffice, one from Livy, one from Cicero and one from Ulpian.⁴ Livy tells us⁵ that the dictator M. Junius Pera, in 216 B.C., *edixit qui capitalem fraudem ausi quique pecuniae iudicati in vinculis essent, qui eorum apud se*

⁵⁰ The adjective occurs only in post-Augustean texts, and only in juridical Latin.

¹ E.g. D. 39. 3. 1 pr. and 1. The case was not absorbed by the *lex Aquilia*, and the term *damnum*, therefore, was only occasionally used.

² See p. 45.

³ In some texts a distinction is made between *furtum* on the one hand and *noxā*, as denoting the remaining delicts, on the other hand.

⁴ The *lex de Gallia Cisalpina* also must here be adduced, if De Visscher's interpretation is correct: comp. above, p. 29.

⁵ 23. 14. 3.

milites fierent, eos noxa pecuniaque sese exsolvi iussurum. In this text, which may well reflect the language of the original decree, those who are guilty of a *noxa* and those who cannot pay their debts appear side by side. *Noxa*, therefore, cannot be confined to delicts by sons or slaves: it signifies crime in general. Cicero says⁶ that, if any of his laws on the government of the State should be violated, *noxiae poena par esto*: again *noxia* covers a great many delicts by the *paterfamilias*, some coming under private law, some under public law. According to Ulpian⁷ *aliud fraus est aliud poena . . . poena est noxae vindicta, fraus et ipsa noxa dicitur et quasi poenae quaedam praeparatio.* Here, too, *noxa* means just 'wrong'. That the adjective *noxius* also, whilst often signifying 'he who is to be noxally surrendered', yet was constantly used in the wide sense of 'he who is guilty' has already been shown.⁸

In support of the view here proposed a few texts may be cited in which Roman writers examine the term *noxa*. Ulpian, commenting upon the clause *noxave solutus non sit* in the edict of the aediles, states⁹: *noxas accipere debemus privatas . . . ex quibus agitur iudiciis noxalibus; denique specialiter cavetur infra de capitalibus fraudibus.* The jurist takes *noxa* as referring to those delicts by a slave for which the owner has either to make amends or to surrender the wrongdoer: in other words, he takes *noxa* in its technical sense. But, obviously, he does not intend in this passage exhaustively to define the term as such; he merely interprets it as it is used in the particular edict in question, the edict on sale of slaves. Actually his interpretation presupposes that *noxa* as such could include at least the *capitales fraudes* committed by a slave. Two more or less exhaustive definitions are given by Festus and Gaius. Festus says¹⁰ that, according to Serv. Sulp. Rufus, *noxa* means *damnum*; that in the language of the orators it means *culpa*; and that occasionally it means *peccatum* or *pro peccato poena*, as e.g. in the rules of the XII Tables mentioning *noxae deditio*. Gaius declares¹¹ that *noxae appellatione omne delictum continetur*. In these explanations nothing is said to restrict *noxa* to the sphere of noxal liability¹²: in fact, Festus

⁶ De Legibus 3. 4. 11.

⁷ D. 50. 16. 131, ad legem Juliam et Papiam.

⁸ See above, p. 28.

⁹ D. 21. 1. 17. 18.

¹⁰ P. 174 and Pauli Excerpta 175.

¹¹ D. 50. 16. 238. 3, libro VI ad legem duodecim tabularum.

¹² It is no doubt possible that both Servius, when explaining *noxa* as *damnum*, and Gaius, when explaining it as *omne delictum*, had in mind only those rules of the XII Tables which related to noxal liability (as for Gaius,

makes it quite clear that the word, whilst indeed having a special function in phrases like *noxae deditio*,¹³ may denote any damage, any wrong, no matter whether the wrongdoer's master or the wrongdoer himself has to answer for it.

(5) In most of the provisions of the XII Tables that contain *nox*, the word undoubtedly means damage affecting, not a person's body, but a person's property: *furtum*, *pauperies*, damage by *aqua pluvia*, by accidental fire. The question arises: why do *nocere* and *nox* so rarely occur in the classical texts on the *lex Aquilia*? The answer is that the jurists preferred those terms which were used in the *lex* itself, above all, the term *damnum*. But why was *damnum* used, rather than *nox*, in the *lex*? It is, of course, not impossible that it was used simply because the author had a liking for the word. But it seems to me that there was a better motive. Had he said *si quis alteri noxiam noxiter quod usserit fregerit ruperit . . .*, the law would have been most ambiguous. It might, in this case, have been misunderstood as meaning: if a man damages another by burning him, fracturing his bone, or breaking his limb. In other words, *noxiam nocere* might have been taken in the sense of 'to inflict physical harm'. The law, thus misinterpreted, would have referred not to damage to slaves and animals, but to damage to a free man's body. The ambiguity, however, was easily avoided by putting *si quis alteri damnum facit*. *Damnum* probably comes from the root *da*, to share out: it is connected with *daps*, a sumptuous feast.¹⁴ Whether or not this etymology is correct, this much is certain—that in ancient Latin *damnum* signifies expenditure, and in particular wasteful, useless expenditure.¹⁵ The clause *si quis alteri damnum facit*, therefore, could not be misunderstood. It clearly meant: if a man causes expenditure, loss, to another. It clearly indicated that the *lex* was designed, not for the case where a free man's body is harmed, but for the case where a man suffers loss through harm being inflicted upon his property, his slave or animal.

see Lenel, *Palingenesia*, vol. i, p. 246); and that the former's statement was torn from its context, and thereby generalized, by Festus (or Verrius Flaccus), the latter's by the compilers. There is, however, no proof for this assumption: the jurists may well have taken into account also the provisions about *aqua pluvia* and the like, which all contained the word. Moreover, even if they did think only of noxal actions, the fact remains that, according to their definitions, the term *nox* in itself does not imply indirect responsibility.

¹³ See below, p. 54.

¹⁴ See A. Vanicek *op. cit.* vol. i, pp. 326 *et seq.*

¹⁵ The word is frequent in Plautus and always has this sense. Occasionally some lady is represented, not very politely, as the personified *damnum*: e.g. Menaechmi 133.

Damnum thus denotes, in a sense, damage indirectly produced. Not that it implies indirect causality as far as the harmful act and its physical effect on the object harmed are concerned. It denotes damage indirectly produced inasmuch as, strictly speaking, there are three steps: the harmful act, the effect on the object harmed, and the *damnum* arising for the owner. One may perhaps say that, considered from this point of view, the Aquilian idea of *damnum* corresponds to the idea of a man's responsibility for beings in his power: just as a man is responsible for acts done by persons or things in his power, so acts done against these affect him as causing him a *damnum*. That the injury inflicted upon a *filiusfamilias* came under the *lex Aquilia* only in advanced law has, of course, special reasons.

It may be worth noting that, in the field of the *lex Aquilia*, the word *damnum* retained the meaning it originally had in the statute up to the Middle Ages. I cannot find a single earlier passage dealing with this *lex* in which *damnum* actually signifies the damage done to the thing itself: it always signifies the damage caused, by destroying or impairing a thing, to its owner. To quote a passage at random: Ulpian says¹⁶ that *si navis tua inpacta in meam scapham damnum mihi dedit*, . . . *Proculus ait . . . lege Aquilia cum nautis agendum, quia parvi refert navem immittendo aut serraculum ad navem ducendo an tua manu damnum dederis, quia omnibus his modis per te damno adficio*. The descriptions here given are typical: *navis tua inpacta in meam scapham damnum mihi* (not *scaphae*) *dedit*; *omnibus his modis per te damno adficio* (not *scapha mea adficitur*). It is highly significant how Gaius' requirement of a close connexion between act and result was altered in the Middle Ages. Gaius explained¹⁷ that a proper action under the third chapter lies only *si quis corpore suo damnum dederit*. This language is quite consistent with that constantly used by him and the other Roman writers: I cause you expenditure by destroying something with my own hands. In the Middle Ages the rule was formulated in a different way. The scholars now spoke of a *damnum corpore corpori datum*, an expression adopted by all our text-books.¹⁸ Here *damnum* denotes, not the expenditure caused to the owner, but the concrete harm inflicted upon the thing: I do harm,

¹⁶ D. 9. 2. 29. 2.

¹⁷ 3. 219.

¹⁸ It no doubt comes to us from Gothofredus on I. 4. 3. 16; but comp. already the *Lex Romana canonice compta*.

with my own hands, to a thing. There is no text on the *lex Aquilia* (nor, for that matter, is there any on *damnum infectum*¹⁹), either in pre-Justinian or in Justinian works, warranting this application of the word.²⁰

If the foregoing remarks are correct, if, under the regime of the *lex Aquilia*, *damnum* was taken in the sense of 'loss caused to the owner', one might ask why *nocere* did not persist as signifying the actual harm inflicted upon the thing. The problem, however, is not difficult to solve. For the author of the statute to say *quod nocuerit* was too vague: he specified three modes of wounding (two of them, at least, *frangere* and *rumpere*, mentioned in the XII Tables) in the third chapter, *quod usserit, fregerit, ruperit*; and he dealt with killing, *occidere*, in the first. The interpreters of the *lex* very naturally proceeded from these verbs. When, in early classical times, a term was needed to comprise *urere, frangere, rumpere* and many other wrongful acts, the word *corrumpere* (not *nocere*) was chosen, which was nearest to *rumpere* appearing in the statute itself.

Even in the classical period *nocere* and *noxa* were freely used with reference to damage to property wherever the influence of the *lex Aquilia* was not too strong: a further proof that it was chiefly the wording of this law through which the terms *damnum, corrumpere, occidere* became technical. *Nocere* and *noxa*, now as before, signified Aquilian damage in extra-legal literature. In legal literature *nocere* remained in some types of damage to property which were not absorbed by the *lex Aquilia*, e.g. in *aqua pluvia*; *noxa* remained as a general

¹⁹ A characteristic example is to be found in D. 39. 2. 24. 5 (Ulpian with reference to Servius): *si ex aedibus . . . tegulae deiectae damnum vicino (not aedibus vicinis) dederint*. The etymology of *damnum* in 39. 2. 3, originally given by Paul when commenting upon legacy *per damnationem* (Lenel, *Palin-genesia*, vol. i, p. 1054), seems to be very much in favour of my suggestion. *Damnum*, as explained by Paul, is not the harm done to the thing, but the loss suffered by its owner: *damnum et damnatio ab ademptione et quasi deminutione patrimonii dicta sunt*.

²⁰ There are, of course, a good many texts showing a tendency in this direction and thus preparing the medieval use of *damnum*. In the field of the *lex Aquilia* itself, I. 4. 3. 16 is to be mentioned: *si non corpore damnum fuerit datum neque corpus laesum fuerit*. Outside the *lex Aquilia*, *damnum* occasionally signifies something like the concrete harm inflicted in the case where a free man is wounded: D. 9. 3. 1. 6, 9. 3. 5. 5, 9. 3. 5. 12. Evidently, the concrete harm and the expenditure resulting from it meet here in the same object, the wounded person: in other words, of the three steps, harmful act, effect on the object harmed, and ensuing loss, the latter two more or less coincide and are not, therefore, clearly distinguished by the lawyers. Moreover, the common extra-legal use of *damnum* in the sense of 'natural defect' (Livy 7. 4. 6) may have been of some influence in these passages: it may also account for *damnum* as actual harm in D. 11. 3. 9. 3, on *servus corruptus*. Several other cases (all outside the *lex Aquilia*) ought to be added, but I cannot here go into them.

term for 'wrong', comprising *furtum*, *inuria* and also Aquilian damage; and, above all, *nocere* and *noxa* were kept in the province of noxal actions.

(6) The question whether or not *noxiam nocere* in Table XII 2, *si servus . . . noxiamve noxit*, means damage to a person's body (exclusively or besides damage to a person's property) may for the moment be left untouched. One thing, at any rate, may confidently be asserted: the jurists, at the time of the XII Tables no less than later, do use the words *nocere* and *noxa* in damage to a person's body. A *lex Valeria Horatia* (already quoted above), enacted 449 B.C., declares inviolate tribunes, plebeian aediles and decemviral judges: *sanciendo ut qui tribunis plebis, aedilibus, iudicibus decemviris nocuisset, eius caput Iovi sacrum esset, familia ad aedem Cereris Liberi Liberaeque venum iret*.²¹ In this law *nocere* signifies mainly acts directed against the privileged man's body, killing, wounding, assaulting, imprisoning him: clearly, to kill the tribune's pig does not, by itself, constitute a violation of sacrosanctity. Another *lex Valeria Horatia* (also referred to above) provides that nobody must create a magistrate *sine provocatione*: he who should do so, *eum ius fasque esset occidere neve ea caedes capitalis noxae haberetur*.²² Here *noxa*, used as a general term for 'wrong', evidently includes murder. The law says that, under certain circumstances, to slay a man is not to be deemed a *capitalis noxa*.

Nocere in the sense of 'to inflict harm upon a person' occurs also in three edicts preserved in the Digest. No dates are known. They are certainly later than the *lex Aquilia*.²³ On the other hand, two of them, the edicts *De his qui deiecerint* and *Ne quis in suggrunda*, seem to be of pre-classical origin: private law and administrative law are inseparably mixed in them; they deal with very special cases; their style is rather formal; and, above all, they require the payment of fixed penalties where a free man's body is hurt or endangered. The edict *De his qui deiecerint* is recorded by Ulpian.²⁴ It distinguishes between *damnum datum factumve*, damage to property; *si homo liber perisse dicetur*, death of a free man; and *si vivet nocitumque esse dicetur*, *nocere* signifying bodily harm other

²¹ Livy 3. 55. 7.

²² Livy 3. 55. 5.

²³ In two (D. 9. 3. 1 *pr.* and 21. 1. 40 *et seq.*) the expression *damnum datum factumve* is used, which must have been created by the interpreters of the *lex Aquilia*; and damage to a slave falls under *damnum* (as in the *lex Aquilia*), not (as in the XII Tables) under the same category as damage to a free man.

²⁴ D. 9. 3. 1 *pr.*

than death. The edict *Ne quis in suggrunda*, also from Ulpian,²⁵ imposes a heavy fine upon him who puts an object on his roof, above a public way, *cuius casus nocere cui possit*. Here, too, *nocere* means damage to a person's body, wounding and killing. This is clear from the *cui*, from the amount of the penalty, which no doubt would have been less high if the praetor had merely wished to prevent damage to property, and last but not least from the fact that in the only case Ulpian discusses²⁶ it is a *transiens* who is injured. Finally, there is the edict *De feris*, commented upon by Ulpian and Paul.²⁷ According to this edict a wild beast must not be led over a public way *ut cuicumque nocere damnumve dare possit*. A fixed penalty is laid down in case a free man is killed; the condemnation is to be for *quanti bonum aequum videbitur*²⁸ if *nocitum homini libero dicetur*; and for damage to property the *duplum* must be paid.

Considering *nocere* and *noxa* refer to damage to a person's body in the *leges Valeriae Horatiae* and in the edicts described, it seems strange, at first sight, that the terms are so infrequently used in this sense by the classical lawyers. Two factors, however, entirely account for their choice of words: the *lex Aquilia*, in the matter of damage to a slave, and the '*edictum generale*', in the matter of damage to a free man. As has been shown above, damage to a slave, under the influence of the *lex Aquilia*, is described as *damnum* where the emphasis lies on the loss caused to the owner, as *occidere*, *rumpere*, etc. where the emphasis lies on the actual harm done to the slave's body.²⁹ The terms *nocere* and *noxa* persist only in noxal actions, and, of course, in non-legal literature. Actually, it must be noted that with some non-legal writers, e.g. Plautus, *nocere* remains one of the commonest verbs to denote the flogging of a slave, and other cruel modes of punishment.³⁰

²⁵ D. 9. 3. 5. 6.

²⁶ D. 9. 3. 5. 12.

²⁷ D. 21. 1. 40 *et seq.*

²⁸ This rule indicates that the edict is later than the two others: it is modelled after the *actio iniuriarum aestimatoria*.

²⁹ Damage to a slave may constitute an *iniuria* under the '*edictum generale*': on this, see below.

³⁰ Amphitryon 391, Asinaria 112, Bacchides 690. The terminology of the *lex Aquilia* has no influence in this domain: as a rule a slave is flogged by his owner, and the damaging of one's own slave never comes under the *lex*. It may be observed, however, that in everyday language even to flog another's slave can be called *nocere*. In Amphitryon 391, Mercury promises Sosias not to hurt him: *dic si quid vis, non nocebo*. It is only natural that he should put it this way: neither he nor Sosias is concerned with the legal question whether the latter's owner may possibly suffer a *damnum* and have an action under the statute; they are merely concerned with poor Sosias' body.

Damage to a free man is usually called *iniuria* by the classics: obviously on the basis of the '*edictum generale*' in which this word appears. The problem must be answered: why is *iniuria* preferred to *noxa* in this edict? Possibly one of the reasons is that, to the author of the edict, *noxa* seems too general a term to be used as the official name of the particular delict in question; it covers so many kinds of wrong, especially in connexion with noxal actions. Far more important, however, is a second point. In the *leges Valeriae Horatiae* as well as in the edicts *De his qui deiecerint*, *Ne quis in suggrunda* and *De feris*, *nocere* means chiefly 'to do actual damage to a person'; it means 'to wound' or even 'to kill'. But the '*edictum generale*', originally, does not refer to such cases at all. It refers to those cases only where a man is assaulted without suffering serious harm. In other words, the '*edictum generale*', originally, deals only with that delict which is mentioned as *iniuria* in the XII Tables. This being so, the praetor takes only the obvious course in keeping to the old term.

The evidence for the view that the '*edictum generale*' does not, from the outset, include serious damage is strong enough. There is the well-known story of Aulus Gellius,³¹ taken by him from Labeo, which it is superfluous to repeat: it clearly shows that the '*edictum generale*' is designed by its author to take the place, not of the ancient provisions on *membrum ruptum* and *os fractum*, but of the ancient provision on *iniuria*; it clearly shows that the edict is designed to deal with offences like a slap in the face. There is the statement by Cato³² that *si quis membrum rupit aut os fregit talione proximus cognatus ulciscitur*. There is the *lex Cornelia de iniuriis*, concerning *pulsare*, *verberare* and *vi domum introire*: these acts are the traditional, typical cases of *iniuria* as late as in Sulla's time. There is the language of the edict: *qui iniuriarum aget*. The plural *iniuriae* as a rule suggests affront rather than serious harm.³³ There is the formula proposed by the praetor, *quod Auli Agerii pugno mala percussa est*,³⁴ hardly the most appropriate example if the edict were intended to cover *membrum ruptum*. There is the rule that the action lies only

³¹ Noctes Atticae 20. 1. 13.

³² Origines 4, preserved in Priscian 6. 13. 69. It does not follow, of course, that no agreement for composition can be made: but the *actio iniuriarum* (existing in Cato's time) does not lie.

³³ The singular also occurs in the edict: *qui iniuriarum aget certum dicat quid iniuriae factum sit* (Lenel, Edictum, p. 389). The praetor emphasizes the fact that it is not sufficient for the plaintiff just to declare that *iniuriae* have been offered; he must specify the exact *iniuria* (singular) committed.

³⁴ Lenel *loc. cit.*

within a year: a rule senseless where a man has lost his arm and obviously introduced at a time when the edict is confined to fairly harmless blows. There is the requirement of intent. Why, if not only *iniuria* proper were contemplated but also *membrum ruptum* and *os fractum*, should the liability be so restricted? Why should the praetor, if he meant to replace the old rules on these delicts, forget about half the cases governed by them? Why should he not at least add a further edict, similar to the '*edictum generale*', to deal with unintentional damage? There is, finally, the general character of the whole group of edicts to which the '*edictum generale*' belongs: *De iniuriis* (the '*edictum generale*', blows), *De Convicio* (also substituted for one specific provision of the XII Tables, namely that on *occentare*³⁵), *De adtemptata pudicitia* (improper behaviour) and *Ne quid infamandi causa fiat* (slander and libel³⁶). In all these cases the wrong essentially consists, not in inflicting any real bodily damage, but in 'coming presumptuously upon one's neighbour', in encroaching upon another's personal sphere, in putting a man to shame. Whether the conception is genuinely Roman or whether it is the Greek *ὑβρις*³⁷ need not here be discussed.

Even if, in spite of these arguments, one does not admit that the '*edictum generale*', as understood by its author, refers exclusively to blows with no serious effects, this much is indisputable: serious effects are not absolutely necessary for the action to be available: it is sufficient that a man should have

³⁵ This is expressly stated by Festus, P. 181. The etymology of *convicium* given by Ulpian D. 47. 10. 15. 3 *et seq.* seems to be old: *convicium . . . a collatione vocum . . . convicium appellatur quasi convocium*. Even in classical times, though the disparaging speech by a single person may constitute *convicium*, it must be made *in coetu*: D. 47. 10. 15. 11 *et seq.*

³⁶ As pattern formula Coll. 2. 6. 5 gives *quod Numerius Negidius illum inmisit Aulo Agerio infamandi causa*. Lenel (*Edictum*, p. 400) alters this into *quod Numerius Negidius illi libellum misit Auli Agerii infamandi causa*. I should suggest that the offence originally contemplated is the case which Ulpian (47. 10. 15. 27) mentions before all other examples, and which has never been satisfactorily explained: the case where a man *ad invidiam alicuius veste lugubri utitur aut squalida, aut si barbum demittat vel capillos submittat*. What is meant, I think, is that A, by mourning somebody whom it is not (or no longer) necessary to mourn, tries to discredit B who does not mourn: for instance, a man mourns his deceased brother after the prescribed period, in order to discredit his brother's widow who is marrying again. If this is correct, it follows that the word *infamare* in this edict originally had a much fuller sense than would appear from the Digest: those who neglect the rules of *luctus* without justification are subjected to serious disabilities, are 'infamous', not only in everyday life but also in litigation. Further, the *Aulo Agerio* in the pattern formula can, on the basis of this view, be kept. As pattern formula I should conjecture: *quod Numerius Negidius capillum submisit or demisit* (instead of *illum inmisit*; comp. *capillos submittat* in 47. 10. 15. 27) *Aulo Agerio* (dative *incommodi*; comp. *ad invidiam alicuius* in 47. 10. 15. 27) *infamandi causa*.

³⁷ This possibility was first suggested by Hitzig, *Iniuria*, p. 55.

been physically assaulted, with malicious intent. Surely a praetor who wishes to indicate that such is to be the scope of the edict must find the word *iniuria* more suitable than *nocere* or *noxa*. Anyhow, the fact that *iniuria* does occur in the edict is of decisive importance for the later development of this branch of law. The term *iniuria* admits of the most generous interpretation; if there is matter for surprise, it is not that the classics subsume a great many offences under *iniuria*, but that they hardly ever overstep the due limits. By the time of Labeo, most of the cases originally classed as *convicium*, *adtemptata pudicitia* and *infamandi causa factum* are already absorbed by *De iniuriis*,³⁸ and an *actio iniuriarum* is given even where a man has been severely wounded.³⁹ The edict *De iniuriis* now really is the '*edictum generale*': and, in consequence, the term *iniuria* is predominant in all kinds of injury rather than *nocere* or *noxa*.

It remains to point out that, where they do not follow the wording of the '*edictum generale*', even the writers of the classical period use *nocere* and *noxa* with reference to damage to a free man's body. *Nocere* and *noxa* persist, above all, in the province of noxal liability, and, outside noxal liability, in the texts on the archaic edicts *De his qui deiecerint*, *Ne quis in suggrunda* and *De feris*.⁴⁰ But other cases are worth mentioning. The noun *noxa*, in the wide sense of *delictum*, now as before includes *furtum*, damage to property and *iniuria*. The verb *nocere* is sometimes used in connexion with *iniuria* as comprising all actually physical injuries: *socium universa . . . conferre debere Neratius ait . . . et ideo sive ob iniuriam sibi factam vel ex lege Aquilia, sive ipsius sive filii corpori nocitum sit, conferre debere respondit*.⁴¹ As regards non-legal sources, *nocere* and *noxa* are frequent of damage to a free person's body throughout all periods.⁴²

³⁸ D. 47. 10. 15. 26, Ulpian referring to Labeo.

³⁹ D. 47. 10. 7. 1 (compare already Cicero, *De Inventione* 2. 20. 59 *et seq.*). As the text stands, Ulpian differs from Labeo. But there may be interpolation, the compilers preferring *publica animadversio*.

⁴⁰ The nature of the wrong in these edicts (behaviour dangerous to the public but not, in the ordinary way, involving criminal design) is very different from the nature of *iniuria* (ἔβρις). The term *iniuria*, therefore, does not intrude into this province.

⁴¹ D. 17. 2. 52. 16 (Ulpian). Neratius does not here have in mind the purely intellectual forms of injury, *convicium* and the like: similarly, *nocere* means only physical injury in Paul 5. 3. 1 (*Quae per turbam fiunt*). The question of interpolation is immaterial to my argument.

⁴² They are frequent especially where the question of *iniuria* does not arise. In Cicero, *Pro Caecina* 21, 60, the distinction is made (and ridiculed: do our international lawyers know this?) between weapons *ad tegendum* and weapons *ad nocendum*. To say *ad iniuriam faciendam* instead of *ad nocendum* would

(7) It is commonly held nowadays that the *actio noxalis iniuriarum* was introduced in the Principate; that, consequently, the XII Tables can have known no noxal liability for damage to a person's body; and that *noxiam nocere* in Table XII 2, *si servus furtum faxit noxiamve noxit*, must have referred exclusively to damage to property.⁴³ There are, however, two flaws in this theory. In the first place, the evidence that the *actio noxalis iniuriarum* was introduced in the Principate is very weak. In the second place, even if it was, noxal liability for serious damage, such as *membrum ruptum* and *os fractum*, may well have existed long before.

The chief basis for the assumption that the noxal action in *iniuria* was first created by the praetor is G. 4. 76: *constitutae sunt autem noxales actiones aut legibus aut edicto praetoris; legibus, velut furti lege duodecim tabularum, damni iniuriae lege Aquilia; edicto praetoris, velut iniuriarum et vi bonorum raptorum*. This text, however, in no way confirms the general opinion. If we infer from it that the XII Tables knew no noxal liability for *iniuria*, we must also infer that they knew none for damage to property. For just as Gaius teaches that the noxal action *iniuriarum* derives from the edict, so he teaches that the noxal action *damni iniuriae* derives, not from the XII Tables, but from the *lex Aquilia*. The argument relied on would therefore lead us to conclude that *noxiamve noxit* in Table XII 2 meant nothing whatever. In actual fact, what Gaius means is no more than that the noxal actions, as available in the law of his time, are founded partly on statutes, partly on edicts: he does not speak at all about *furtum* before the XII Tables, or *damnum* before the *lex Aquilia*, or *iniuria* before the edict. In *furtum*, he says, the noxal action is founded on the XII Tables. To judge by what we know about the history of the delict, this statement is perfectly correct. There was never a statute or edict on *furtum* overruling the system of the XII Tables as a whole. The praetor confined himself to a few innovations, but these did not replace Table XII 2. The position is different as regards *damnum* and *iniuria*. In *damnum*, the *lex Aquilia* did supersede the provisions the XII Tables had on the same subject, and actions, whether noxal or not, were henceforth given under the new statute. Thus Gaius declares, rightly, that the noxal action *damni iniuriae*

not only be clumsy but also slightly alter the meaning of the antithesis. Weapons *ad nocendum* are instruments essentially destined for use in war and warlike enterprises: the enterprise may constitute an *iniuria* or it may not.

⁴³ See De Visscher *op. cit.* p. 126, with further literature.

is founded on the *lex Aquilia*. As for *iniuria*, whether or not there was noxal liability under the XII Tables, the classical law in this matter was entirely based on the '*edictum generale*' and related edicts. They were designed, from the beginning, to replace older rules, and, as extended by interpretation, swept away the whole legislation of the XII Tables on personal injury. Again Gaius is justified in saying that the noxal action *iniuriarum* is available on the authority of the praetor. It follows that the passage shows neither that there was no noxal liability for *damnum* before the *lex Aquilia* nor that there was no noxal liability for *iniuria* before the praetorian reform. It merely shows that, for the classical lawyers, the noxal action was based on the *lex Aquilia* in the former case, on the edict in the latter.

The remaining two sources usually adduced to show that noxal liability for *iniuria* was late supply, in reality, but an argument *e silentio*: the Tabula Heracleensis and the Fragmentum Atestinum, whilst presupposing the existence of a noxal action in *furtum*, do not allude to it in *iniuria*.⁴⁴ These statutes, dating from the middle of the 1st century B.C., are said to prove that even at the end of the Republic the *actio noxalis iniuriarum* was yet to come. Actually, De Visscher goes as far as to suggest, as a 'fragile hypothesis',⁴⁵ that it was only Julian who invented it. But since the analysis of the Tabula Heracleensis by Gradenwitz,⁴⁶ it must appear very doubtful whether there is much certainty in such deductions. Gradenwitz has convincingly demonstrated that in the Tabula Heracleensis old and new material, material taken from this source and material taken from that source, appear side by side, without being efficiently harmonized⁴⁷: and inexactitudes, I believe, can be detected also in the Fragmentum Atestinum. Consequently, the reason why the noxal action is referred to in *furtum* and not referred to in *iniuria* may well be that the rules on *furtum*, the delict with the uninterrupted tradition, go back to a more formal and elaborate text than those on *iniuria*. Several peculiar features in the statutes distinctly point this

⁴⁴ Tabula Heracleensis, lines 110—111, Fragmentum Atestinum, lines 2—4.

⁴⁵ *Op. cit.* p. 347.

⁴⁶ Die Gemeindeordnungen der Tafel von Heraclea, Sitzungsberichte der Heidelberger Akademie, Philos.—Histor. Klasse, 1916, 14.

⁴⁷ With this view that of Premierstein does not actually conflict. Premierstein says (Die Tafel von Heraclea und die Acta Caesaris, Zeitschrift der Savigny-Stiftung, 1922, pp. 45 *et seq.*) that the Tabula Heracleensis contains various *Acta Caesaris* drafted in Caesar's lifetime and promulgated, unrevised and as one law, after his death. In fact, Premierstein seems to confirm Gradenwitz. His theory explains why there are more and stronger inconsistencies in the Tabula Heracleensis than in other statutes concerning municipal government.

way. According to the Tabula Heracleensis he must not become a magistrate *quei furtei quod ipse fecit fecerit condemnatus pactusve est erit; queive iudicio fiduciae, pro socio, tutelae, mandatei, iniuriarum, deve dolo malo condemnatus est erit, etc.* *Furtum* comes first; then *fiducia*, *societas*, *tutela* and *mandatum*; and finally *iniuriae* and *dolus*. Clearly, *furtum* is in a class by itself: *iniuriae* and *dolus* are separated from it, they belong to a different stratum. Furthermore, the *pactus* is mentioned only in *furtum*,⁴⁸ but not in *iniuriae* or *dolus*: another striking inconsistency, and this time it looks as if there were less preciseness in the cases of *iniuriae* and *dolus*. Most important, however, is a third point. Whereas in *furtum* a man is not disqualified unless *ipse fecit fecerit*, no corresponding restriction is expressed with regard to *fiducia*, *societas*, *tutela* or *mandatum*: the statute does not say that a man is not disqualified unless condemned *suo nomine*. Considering this omission, the fact that no restriction is expressed with regard to *iniuriae*, the delict coming after *mandatum*, does not seem to be a sound basis for far-reaching conclusions. To turn now to the Fragmentum Atestinum, we find here various rules as to when an action, condemnation in which makes infamous, may be brought before the municipal magistrate. The statute deals with the actions *fiduciae*, *pro socio*, *mandati* and *tutelae*, in so far as the defendant is sued *suo nomine quodve ipse earum rerum quid gessisse dicetur*; with the action *furti*, in so far as it is a case of *furtum quod ad hominem liberum liberamve pertinet*; and with the action *iniuriarum*. Leaving aside the fact that the list is rather incomplete (*actio doli?*), it must be observed that the clause *quod ad hominem liberum liberamve pertinet*, if designed to exclude the noxal action, does not say what it is meant to say. As it stands, it excludes theft by a slave but not theft by a son: theft by a son unquestionably is a *furtum quod ad hominem liberum pertinet*. Assuming the author of the statute is also the author of this clause, he was careless in formulating it. Assuming (what is more likely) he has taken it from a different context, he was careless in leaving it as it was. In any case, it is unsafe to infer too much from the absence of the clause in *iniuriae*.

As there are no further textual testimonies, the theory that the noxal action in *iniuria* dates from the Principate cannot be regarded as proved. At the same time, however, it is impossible to disprove it. One point should be noted: even if

⁴⁸ He is mentioned also in insolvency, dealt with in lines 114—115.

the praetorian *actio noxalis iniuriarum* only came into being after the time of the Tabula Heracleensis, we are not entitled to conclude that there lay no civil noxal actions in personal injury under the XII Tables: in cases of serious damage, at any rate, the XII Tables may well have had noxal liability. It is a mistake, in discussing ancient law, to equate *iniuria* with *iniuria plus membrum ruptum plus os fractum*. As has been remarked above, the praetor, when creating the edict *De iniuriis*, meant by *iniuria*, not severe wounds, but physical assaults with no great effect. In other words, what he intended to deal with was, not the infliction of any concrete harm, but ὄβρις as such. Now ὄβρις proper is an offence rarely committed by persons in *potestas*: slaves, in particular, presumably cannot commit ὄβρις in the fullest sense at all. It is well known that in some at least of the Greek systems there was no noxal liability in ὄβρις,⁴⁹ a feature to be explained, I think, by the fact that true ὄβρις is an attitude only a free and fully responsible person can show. Thus, whether or not the author of *De iniuriis* was influenced by Greek legislation, it is quite conceivable that he had special reasons for not allowing the noxal action, reasons that never applied, say, in the case of *membrum ruptum*.⁵⁰ Proceeding from this assumption, one might hold that the *actio noxalis iniuriarum* was not introduced before the Principate because only now was it an established principle that any bodily damage, slight or serious, should fall under the '*edictum generale*': the *actio* was introduced, that is, when the edict definitely covered also injuries like *membrum ruptum* and *os fractum*, which had always given rise to noxal liability. It is, perhaps, noteworthy in this connexion that the *lex Cornelia de iniuriis*, which brings no examples of serious harm but only *pulsare, verberare, vi domum introire*, did not include delicts by slaves.¹

The unfortunate result is that, in determining the scope of *noxiam nocere* in Table XII 2, we have to rely on the vaguest circumstantial evidence. What are the general arguments for the view that the provision did not concern damage to a person's body? De Visscher says that, in that age, the word *noxa* as

⁴⁹ See De Visscher *op. cit.* pp. 383 *et seq.* with further references.

⁵⁰ Plato, Νόμοι 9. 879A and 883A, has noxal liability where a slave actually wounds a free man; he has no noxal liability where a slave merely beats a free man. The distinction, which seems to reflect some positive law Plato knows (see Hitzig, *Iniuria*, pp. 85 *et seq.*), may well go back to a time when a difference was made between real bodily damage on the one hand and beating a man, as ὄβρις, on the other: a slave could not be guilty of ὄβρις; if he beat a free man, he was punished '*extra ordinem*'.

¹ D. 48. 2. 12. 4.

such was confined to damage affecting a person's property. It has already been shown, however, that the texts do not suit this hypothesis. He further maintains that the XII Tables spoke of *poena* only in *os fractum* and *iniuria*: and he infers that these delicts against the body, the class of *poena*, were opposed to those against the property, the class of *noxa*. But this proposition also cannot be accepted. As pointed out above, *os fractum* and similar damage did always come under the notion of *noxa*. Why the fact that a *poena* must be paid should make any difference I fail to see. *Poena* appears in connexion with *noxa* in the *lex Poetelia*: *ne quis nisi qui noxam meruisset, donec poenam lueret, in compedibus aut in nervo teneretur*.² Whatever *noxa* may here mean,³ it leads to a *poena*: the fields of *noxa* and *poena* are not two strictly separate sections of the law. There is, however, a rule in the XII Tables themselves which De Visscher has overlooked, and which is in direct contradiction with his theory. The XII Tables had fixed penalties not only in *os fractum* and *iniuria*: Table VIII 11 imposed a fixed penalty, a *poena*,⁴ upon him who cuts down another's tree. Surely this delict must belong to the same class as the nocturnal cutting of another's crops: it must belong to the class of *noxa*.⁵ And yet there is a fixed penalty. The distinction between the two classes, delicts against the body with *poena* and delicts against the property with *noxa*, evidently does not work. Another assertion made by De Visscher, indeed the gist of his whole system, is that the authors of the XII Tables contrasted *noxa*, 'the right arising for the owner of a damaged or stolen thing', with *vindicta*, 'the right arising for a man who has suffered personal injury'. It is difficult to see how this can possibly be correct. There is not a single provision in the XII Tables mentioning the *vindicta* of an injured person. There is not a single text in the Roman literature in which *noxa* signifies a right at all. It invariably signifies 'damage', 'wrong', be it damage to a person's body or to a person's property, be it damage that can be made good by a mere

² Livy 8. 28. 8.

³ According to De Visscher, *La Lex Poetelia Papiria*, Études, pp. 315 *et seq.* *noxa* comprises here all delicts, a most plausible interpretation. But, then, has the author of the *lex* quite forgotten the distinction between *noxa* and bodily damage? Has he quite forgotten that *poena* is not the proper term to use in a rule covering delicts against the property?

⁴ I very much doubt whether the term *poena*, at the time of the XII Tables, was used only as signifying a fixed penalty. But I accept this premise for the sake of argument.

⁵ In Table VIII 9, dealing with the *impubes* who cuts another's crops at night, the term *noxia* is used.

noxiam sarcire or damage that is punished in a different way.⁶ There is not a single text in the Roman literature in which *noxa* and *vindicta* are contrasted. In fact, the only passage, as far as I can see, where a connexion is established between the two concepts is D. 50. 16. 131: Ulpian says here (ad legem Juliam et Papiam) that *poena est noxae vindicta*. Clearly, this text is quite incompatible with De Visscher's view. *Noxa* means 'wrong', *vindicta* 'the punishment of *noxa*', and even the word *poena* occurs though we are in the province of *noxa*. True, the text is some 650 years later than the XII Tables. But De Visscher quotes no other in which *noxa* and *vindicta* are brought into relation.

Nobody denies that the rules of the XII Tables concerning what we call delicts against a person's body may have differed in some respects from those concerning what we call delicts against a person's property.⁷ It must not be forgotten, however, that within the domain of delicts against property there was also an enormous difference between various kinds of damage. Some modes of *furtum*, e.g., were considered as more serious than *membrum ruptum*: the simple destruction of a thing, on the other hand, seems to have been a small matter. That the *decemviri* should have assigned to one class, entitled *noxa*, all the manifold delicts against the property, as opposed to those against the body, is (proofs lacking and *noxa* meaning bodily damage in the *leges Valeriae Horatiae*) not credible. Besides, could they have done so even if we had suggested this arrangement? When we say that *furtum* was a delict against the property and *os fractum* one against the body, we probably are most inaccurate. As the lawyers of the 5th century saw it, *furtum* surely was no mere attack against the property but an attack also against the person; again, *os fractum* was essentially the same delict whether the victim was a *paterfamilias* or his property, a slave. Be this as it may, *furtum*, even if not *furtum manifestum*, was an offence gross enough to be paired off with bodily damage⁸: there is nothing to show

⁶ It would lead too far afield to examine when the person responsible for a *noxa* must *noxiam sarcire*, when *damnum decidere*, when *poenam luere* and so forth. Suffice it to say, with regard to the first two expressions, that *noxiam sarcire* seems to come from those cases where no more and no less is required than actually 'to mend the damage': and *damnum decidere* from those where there is either no concrete damage to mend (because nothing has actually been destroyed) or where more than just 'mending' is expected (*vindicta falsa*, possibly *furtum*, and the like); that is to say, where the responsible party must seek 'an agreement concerning the loss'.

⁷ But there is exactly the same penalty in *iniuria* as in cutting down a tree.

⁸ Even in *furtum* that was not manifest the damages must frequently have amounted to more than in *os fractum*.

that a lawgiver who established noxal liability in one of these delicts was prevented from establishing it in the other. In the absence of any evidence to the contrary,⁹ I am inclined to think that *noxiam nocere* in Table XII 2 did include damage to a person's body, though, perhaps, not *iniuria* proper. Actually, for the authors of XII 2, *furtum* and damage to a person's body may well have been more important than damage to a thing. One has to remember that the code, whilst indeed mentioning the *paterfamilias* guilty of theft or bodily damage, does not mention the *paterfamilias* guilty of simple damage to a thing: the law, in the latter case, probably was in no need of reform. It seems to me not impossible that the *decemviri*, in dealing with delicts by sons and slaves, had in mind chiefly those two kinds of wrong for which they gave elaborate provisions in case they were committed by a *paterfamilias*.¹⁰ But it must be repeated: there is no certainty about this point.

In conclusion, a remark may be added about the original meaning of *noxae deditio*, *noxia caput sequitur*, *noxia solutus*. The most plausible view seems to me that *noxia*, in these phrases, signifies 'wrong': that *noxae deditio* means 'surrender because of (as a result of, by way of making amends for) a wrong'; that *noxia caput sequitur* means 'the wrong (the delictal state, the state of a *noxius*) follows the man'; and that *noxia solutus* means 'free from wrong' or 'redeemed from a wrong'. The idea that *noxia*, a wrong, makes the wrongdoer liable to the person wronged appears to be present also in the old adjective *obnoxius*, which often signifies 'he who is tied, subjected to somebody for a wrong'. It is not impossible, however, to understand *noxae deditio* and the like in a different way. As has been observed above, *nocere* in Plautus is frequently used in the sense of 'to flog', 'to punish' a slave. Thus *noxia*, in the expressions under notice, may conceivably

⁹ According to Festus P. 174, Servius interpreted *noxia* as *damnum*. But it is very unlikely that he had in mind the *noxiam nocere* of Table XII 2. Even if he had, it by no means follows that he intended to exclude bodily damage: *damnum* in his time was wide enough to comprise both the loss resulting from damage to property and that resulting from damage to the person. Most probably, however, Servius was referring to the phrase *noxiam sarcire*. This is suggested by Festus P. 322: *sarcito in XII Ser. Sulpicius ait significare damnum solvito, praestato*.

¹⁰ G. 4. 75 opens the chapter on the noxal actions with the words: *ex maleficio filiorum familias servorumque, veluti si furtum fecerint aut iniuriam commiserint*. . . . If *noxiam nocere* in Table XII 2 referred primarily to damage to a person's body, the clause *si furtum fecerint aut iniuriam commiserint* in Gaius may well be a modern version (made by Gaius himself or before him) of *si furtum faxit noxiamve noxit*: in classical times, the technical term for damage to a person's body was *iniuria*.

mean, not the wrong to be punished, but the punishment itself, the harm inflicted upon the culprit. On the basis of this assumption, *noxae deditio* would have to be translated as 'surrender for flogging, for punishment', *noxa sequitur* as 'punishment follows the man', and *noxa solutus* as 'free from punishment' or 'redeemed from punishment'.¹¹

¹¹ In the phrase *furtis noxisque solutus*, however, *noxae* (plural) cannot mean punishment. This clause, obviously modelled after Table XII 2, must mean: a slave who is free from thefts and other wrongs. Which of the two, if any, is older than the other, *furtis noxisque solutus* (Varro, *Rerum Rusticarum* 2. 10. 5) or *noxa solutus* (edict of the aediles; Gellius, *Noctes Atticae* 4. 2. 1, and D. 21. 1. 1. 1), is difficult to say.—I should like to thank Mr. P. W. Duff for his most valuable criticism.

ASSAULT AT COMMON LAW.

J. W. CECIL TURNER.

THE student who seeks to discover the essential elements of the crime of Assault at Common Law as distinct from Battery does not receive much help from the standard text-books. Most of them in substance follow the description of assault given by Hawkins¹: 'An assault is an attempt or offer, with force and violence, to do a corporal hurt to another.'

Thus Archbold² says: 'An assault is an attempt to commit a forcible crime against the person of another; such as an attempt to commit a battery, murder, robbery, rape, etc.' Russell³ says: 'An assault is an attempt or offer to apply force of any kind to another person, by striking, touching or moving him or otherwise applying any direct or indirect force to him.' In Stephen's Digest⁴ assault is defined as '(a) an attempt unlawfully to apply any the least actual force to the person of another directly or indirectly, (b) the act of using a gesture towards another giving him reasonable grounds to believe that the person using the gesture meant to apply such actual force to his person as aforesaid, (c) the act of depriving another of his liberty, in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud'. Halsbury⁵ defines assault as 'an offer or attempt to apply force or violence to the person of another in an angry or hostile manner. . . . If no actual violence is used there must, to constitute an assault, be some threatening act sufficient to raise in the mind of the person threatened a fear of immediate violence. . .' Kenny⁶ states that 'An "assault" is an unlawful attempt or offer, to do with violence a corporal wrong to another person . . . Alarm is essential to an assault'.

Not only do these definitions lack precision but also they do not coincide with one another in substance. Is there intended to be a distinction drawn between the words 'attempt' and 'offer'? It would seem that the learned editors of Archbold

¹ Hawk. P. C. c. 62.

² Archbold, Criminal Pleading, Evidence and Practice, 30th ed. p. 945.

³ Russell on Crime, 9th ed. p. 573.

⁴ 7th ed. p. 248.

⁵ Laws of England, 2nd ed. ix, 470.

⁶ Outlines of Criminal Law, 15th ed. p. 175.

identify these two words, for although they refer to Hawkins they omit the word 'offer'. Does the definition in Stephen's Digest mean that if an attempt as set out in para. (a) is proved, then a conviction can be obtained although the evidence does not satisfy the terms of para. (b)? Does the definition in Halsbury mean that there can be no conviction for assault unless the acts complained of were done in an angry or hostile manner? Must there always be the means of carrying out the threatened violence? For example, is it an assault to point an unloaded pistol at a person?

It is submitted that if due regard be had to the accepted principles of our common law of crime, a simple definition of assault can be constructed which will dispose of all these and other similar difficulties.

The crime under consideration is Common Assault, as distinct from Battery. It is a common law offence although now included in the Offences against the Person Act.⁷ It is necessary therefore to begin by applying the most elementary principles of liability at common law; a course for which, unfortunately, no apology is needed. Many a case has gone up to a Court of Appeal owing to the mistaken assumption that it was unnecessary to expound elementary principles of law in the Court below, and writers of textbooks have run into difficulties for the like reason.⁸

The first thing to be considered is therefore the hackneyed maxim: '*Actus non facit reum nisi mens sit rea.*' This maxim is nowadays to be taken as indicating⁹ that the prosecution must establish that the voluntary conduct of the accused person brought about *a certain physical result which the law seeks to prevent* (the so-called *actus reus*) and that *he realised at the time* that his conduct might or would *produce results of a certain kind*, i.e. that he had a certain state of mind (*mens rea*).

It follows that the two points which first have to be settled in analysing the crime of assault are (1) What is the physical result (*actus reus*) which the law seeks to prevent? and (2) what are the consequences which the accused person must have foreseen?

Actus Reus.

It is submitted that the *actus reus* of assault is *causing the person threatened to apprehend that unlawful force is about*

⁷ 24 & 25 Vict. c. 100, s. 47.

⁸ Kenny, *op. cit.* 177.

⁹ For a fuller exposition of the meaning of the maxim, see C. L. J. 1936, vol. vi, pp. 31 *et seq.*

to be applied to him by the wrongdoer, i.e. causing a certain state of mind in the victim.

A study of the cases shows that this is the essential element although it has not always been clearly recognized. The point seems to have been appreciated in the early case of *Dause v. Luce* (17 Car. 2), 1 Keble 921, where it is stated: 'and the assault must be such, as is a just ground of terror, as holding up a sword'.

In the well-known case of *Tuberville v. Savage* (21 Car. 2), 1 Mod. 3, emphasis was laid on the *intention* of the alleged assaulter, in these words, 'The *intention* as well as the *act* makes an assault', but nothing was said expressly as to the effect on the mind of the person threatened. However, as the words which negatived the intention to assault when Tuberville put his hand upon his sword, 'If it were not assize time I would not take such language from you', were spoken to Savage, it is clear that Savage cannot have anticipated an immediate attack. The report adds, '. . . so if he hold up his hand against another in a threatening manner, and say nothing, it is an assault'.

There is, however, a very clear recognition of the principle to be found in the fifth edition (1822) of Comyns' Digest, II, 275, note (r), which reads as follows:—

'2. It is said, that in order to constitute an assault, a design or intention to injure must concur with the act. 3. But the rule, perhaps, will be found to be this; if the defendant's demeanour naturally impressed the plaintiff with the idea that he was about to strike him, it is an assault, notwithstanding his real intention was to do him no mischief. 4. Which position will not in the least impugn the decision of *Redman v. Edolfe*, 1 Mod. 3,¹⁰ usually cited to support the other way of thinking. 5. That case was thus; the defendant laid his hand upon his sword saying to the plaintiff, if it were not assize time I would not take such language from you: it was adjudged that the act did not amount to an assault, for in that the intention to injure is an essential ingredient, and here it was wanting. 6. In the case of an assault the *damage* consists in the inconvenience produced by the fear which the act impresses upon the plaintiff's mind. 7. And as such impression can only arise where the attempt to injure is coupled with a present ability, the plaintiff

¹⁰ This reference is incorrect: the case intended on p. 3 of 1 Mod. is number 13, *Tuberville v. Savage*. The learned editor has given the name of the previous case, number 12.

must be placed within reach of the offensive means, or he has not been injured. 8. Thus if the assault consists in lifting up one's fist, in a threatening manner, the plaintiff must stand within reach of a blow; if in pointing a gun at the plaintiff, he must stand within range; in which latter case, however, the circumstance of the gun being unloaded can make no difference, provided the idea of an assault hazarded before, is the true one, and provided also that the plaintiff is unawares of the fact.'

In 1840 the point arose in the case of *R. v. St. George*¹¹ before Baron Parke, who said¹², 'It seems to me that it is an assault to point a weapon at a person, though not loaded, but so near, that if loaded, it might do injury. I think the offence of pointing a loaded gun at another does involve an assault, unless it is done secretly; and I think that the presenting a fire-arm, which has the appearance of being loaded, so near that it might produce injury if it was loaded and went off, is an assault'. These remarks show clearly that the learned Baron regarded the gist of assault as lying in the *impression* created on the mind of the victim. This view is confirmed by his later *dicta* in the same case. Thus he says¹³: 'It is not in my judgment necessary to constitute the common law offence that the fire-arm should be loaded . . .' And again¹⁴: 'My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party "This is an empty pistol", then that would be no assault; for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent.'

Before leaving *R. v. St. George* it must be pointed out that the prisoner in this case was not charged with common assault; the offence with which he was charged was a statutory felony under 1 Vict. c. 85,¹⁵ and the point on assault arose on the question whether the prisoner could be convicted of a *statutory* assault under section 11 of the Act, of which it will be necessary to speak again later.

In 1851 Baron Parke's *dicta* were quoted with approval in the case of *R. v. Ladyman*.¹⁶ The prisoner, a boy, was indicted

¹¹ 9 C. & P. 483.

¹² At p. 490.

¹³ At p. 491.

¹⁴ At p. 493.

¹⁵ Repealed by 24 & 25 Vict. c. 95, s. 1.

¹⁶ (1851) 15 J. P. 581.

for feloniously shooting with intent to murder and in a second count with intent to do grievous bodily harm. Having pulled the trigger of a gun which did not go off, he presented it at another boy and again pulled the trigger, and this time the gun went off and inflicted serious injuries. There was evidence that the prisoner believed the gun not to be loaded. Although it is not expressly so stated in the report, the offence must have been charged under 1 Vict. c. 85. The evidence clearly negatived any intention to murder or to inflict grievous bodily harm, and the only question was whether the prisoner could be convicted of assault under section 11. Counsel for the prisoner argued that assault was an attempt to commit a forcible crime and that the prosecution must establish an intention on the part of the accused to use violence against the person of another. Counsel for the prosecution replied: 'The case of *R. v. St. George* . . . proceeds upon the ground that whether a gun is or is not loaded, the presenting it at another person is likely to cause alarm to that person', and Cresswell J., after quoting the last above-mentioned¹⁴ *dictum* of Parke B., went on to say, ' . . . it is just as if one man holds his fist up to another, though not within reach of him, if it is sufficient to incite fear into the mind of that other person, it is an assault . . . at present I must tell you that presenting a gun at such distance that if loaded and fired it might hit the person at whom it was presented, is an assault, whether the prisoner knew or not that it was loaded'. The learned judge thus did not accept the argument for the defence, that the crime of assault depended upon the intent to use violence.¹⁷

From the foregoing the position would seem to be clear, and to support the proposition contended for, that the *actus reus* in assault consists in creating apprehension in the mind of the victim that unlawful force is about to be applied to him. If this is so, it does not matter whether or not the assailant intends to inflict such force, or can inflict it. It will, however, be no assault if the person threatened does not apprehend that the force will be inflicted either because *he* may think it impossible (*e.g.* he may know or believe that he is out of reach or that a weapon is unloaded) or because he does not know that he is being threatened (*e.g.* he may be asleep, or a newly born baby¹⁸ or

¹⁷ In spite of his direction the jury returned a verdict of not guilty; perhaps out of sympathy with what the judge described as 'this unfortunate case'.

¹⁸ This seems to follow from the cases of *R. v. Renshaw* (1847) 2 Cox 285, and *R. v. March* (1844) 1 C. & K. 496.

his assailant may be secretly¹⁹ approaching from behind). The suggested tests of *attempting*, or of *intending* to inflict violence are not true and exclusive tests.²⁰

Cases of attempted violence *may* be assaults but they are not necessarily so, for example an attempt to shoot a man who is unaware of his danger: and as we have seen, assault can exist without any attempt or desire to inflict the threatened harm. To introduce this point of intending the threatened harm is indeed, as will be submitted below, to make a serious mistake as to what is the *mens rea* in the crime of common assault.

It may be well at this point to refer to the crime of False Imprisonment, for in some authorities it is confused with Assault. Indeed, false imprisonment is sometimes treated as though it were merely a special form of assault. Thus, in both Kenny and Stephen it is discussed only in connexion with assault and not dealt with as a distinct and separate crime at all. This is strange, for long ago Coke pointed out²¹ that false imprisonment had been an indictable misdemeanor since Magna Charta,²² and neither he nor Comyns nor Blackstone identifies it with assault. Russell says,²³ 'It usually, but not necessarily, involves an assault,' which is true, for in most instances when false imprisonment occurs, assault and battery will also in fact have been committed. Statements have, however, been made to the effect that mere wrongful deprivation of liberty amounts, *per se*, to an assault. Hawkins²⁴ has been given as authority for this proposition. Hawkins' words are: '... he who is threatened to be imprisoned by another has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man', but as he proceeds to argue with reference to battery it would seem that he had in mind an imprisonment involving physical force, especially as when defining and discussing assault he says nothing of false imprisonment.

Nevertheless in *Pocock v. Moore*²⁵ where the plaintiff, being given into the custody of a constable and being called upon to accompany him, had done so without being touched, Abbott L.C.J. said, '... if the constable tell the party charged that he must go with him, on which the other, in order to prevent the

¹⁹ *R. v. St. George*, at p. 490: 'Unless it is done secretly'.

²⁰ A person who *attempts* a thing must necessarily *intend* to do it; see C. L. J. 1934, vol. v, p. 235.

²¹ 2 Inst. 55; see also Com. Dig. 5th ed. 480.

²² M. Ch. 9 H. 3. 29.

²³ *Op. cit.* p. 590.

²⁴ 1 P. C. ch. 60. 7.

²⁵ (1825) Ry. & Mood. 321.

necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment. Then, as every false imprisonment includes an assault, the plaintiff may recover on the count for a common assault'. His Lordship's words would seem to indicate that he envisaged a threat by the constable of the application of force, and if so this case is within the ordinary principles of assault.²⁶

In the case *R. v. Linsberg*²⁷ an accoucheur had been prevented from leaving his patient by being locked in the room. He was not touched. There were three counts in the indictment, one for assault and false imprisonment, the second for false imprisonment, and the third for common assault. From the report it may be suggested, with respect, that neither the counsel, nor the Judge, appreciated that false imprisonment was itself an indictable misdemeanor. Counsel for the prisoner said, '... the prisoner will plead guilty to the second count of the indictment, but that count, not alleging any assault and battery, does not charge an indictable offence'. Counsel for the Crown thereupon sought to establish that false imprisonment was assault, by reference to *Pocock v. Moore*,²⁵ *Hunter v. Johnson*²⁸ and *Hawkins*.²⁴ The Common Serjeant, in summing up, said²⁹: 'A very important question arises in this case. Does false imprisonment without any actual assault and battery constitute an indictable offence? I am satisfied by the authorities quoted that the mere imprisonment is an assault and can be, and is in this case, an indictable offence.'

In each of the cases referred to in *R. v. Linsberg* it will be found that the facts justify the conclusion that the accused person had presented the other party with the alternative of submitting quietly or of suffering the application of physical force and this is in effect a threat of physical force sufficient to amount to an assault³⁰ on the general principles above stated. It is therefore submitted that the *dicta* of the authorities in dealing with false imprisonment necessitate no modification in these principles.

If a person were in a room, and another person, in order to keep him there, were secretly to lock the door from the outside, this would be a false imprisonment, but to treat it as an assault would involve a divergence from the principles of

²⁶ The attention of the Court does not seem to have been drawn to the case of *Arrowsmith v. Le Mesurier* (1806) 2 Bos. & Pul. (N. R.) 211.

²⁷ (1905) 69 J. P. 107.

²⁸ (1884) 13 Q. B. D. 225.

²⁹ At p. 108.

³⁰ See American Law Institute's Restatement, Torts, Sec. 30.

assault laid down by all the authorities since Hawkins much more wide than the authority of *Pocock v. Moore* or *R. v. Linsberg*, on the facts of these cases, could warrant.

Mens Rea.

In common assault the *mens rea* is merely the realization in the mind of the wrongdoer that his conduct will produce the necessary impression on the mind of the victim. He must, in other words, either intend to alarm the victim, or (it is submitted) intend to do something which he realizes may cause such alarm.³¹ It is this element of *mens rea* which is indicated in the statements as to 'intention' found in some of the early authorities.³²

It is now necessary to consider a difficulty which has been raised in certain text-books, as to whether, in order to constitute an assault, there must, in all cases, be the means of carrying the threat into effect. The authority for this proposition is given in Kenny³³ as the case of *Stephens v. Myers*.³⁴ In that case the defendant, at a parish meeting, used threatening words and was advancing with his fist clenched towards the chairman, but was stopped before he could reach him. Tindal, C.J., said: 'It is not every threat . . . that constitutes an assault, there must in all cases be the means of carrying the threat into effect. The question . . . will be whether the defendant was advancing at the time in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopt; then, though he was not near enough at the time to have struck him, yet he was advancing with that intent, I think it amounts to an assault in law.' On this it is submitted that it must not be supposed that Tindal, C.J., intended to give a considered pronouncement of general principle, but even if he did so intend, his *dictum* was not supported by authority. In the very case before him it was clear on the facts that it was not possible for the defendant to strike the chairman, and yet he was convicted. The real point is that unless the infliction of the threatened harm appears possible to the victim he cannot be said to have expected to suffer it. Kenny, however, goes on³⁵ to state that it was ruled,

³¹ See C. L. J. (1933) V, pp. 62—65, and C. L. J. (1936) VI, pp. 38, 39.

³² *E.g.* in *Tuberville v. Savage*, 1 Mod. 3, and *Williams v. Jones* (1736) 2 Stra. 1049; see also *Coward v. Baddeley* (1859) 28 L. J. Ex. 260.

³³ *Op. cit.* p. 177.

³⁴ (1830) 4 C. & P. 349.

³⁵ *Loc. cit.*

in *R. v. James* (1844)³⁶ that it was no assault to present at a person a pistol incapable of being discharged, although in an earlier case, *R. v. St. George*,³⁷ it was ruled that if a person presents a firearm which he knows to be unloaded, at a man who does not know that it is unloaded, and who is so near that (were it loaded) its discharge might injure him, an assault is committed.

Again, in Archbold³⁷ it is suggested that *R. v. James* conflicts with *R. v. St. George* on this point, while in Russell³⁸ *R. v. St. George* is opposed not only by *R. v. James* but also by *Blake v. Barnard*.³⁹ The cases are also contrasted in the English and Empire Digest.⁴⁰

Now of this it may be said that it is not easy to see why the impossibility of carrying out the threat should *per se* be of any importance, so long as alarm be created in the mind of the victim. Russell,⁴¹ indeed, speaks of 'an actual or apparent present ability of using actual force'. It is not essential in 'Attempts',⁴² and as it is clear that an attempt to harm, if appreciated by the victim, is also an assault, there is no reason why the question of possibility should be relevant in assaults either. Therefore, even if there were a conflict between *R. v. St. George* and *R. v. James* it is permissible to argue that on principle *R. v. St. George* is right. The interesting fact is, however, that when the reports are carefully examined it will be found that there is no conflict between these two cases.

In both cases the indictment charged offences against the same statute, namely 1 Vict. c. 85.¹⁵ This statute provided in section 3, *inter alia*, 'that whosoever . . . shall . . . by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person . . . with intent . . . to commit the crime of Murder shall, although no bodily injury shall be effected, be guilty of felony. . . .' In section 4 it was similarly declared to be a felony if the intent, in the like case, were to do grievous bodily harm.

Section 11 of the Act provided 'that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an Assault against the person, it shall be lawful for the Jury

³⁶ 1 C. & K. 530.

³⁷ *Op. cit.* p. 945.

³⁸ *Op. cit.* p. 574.

³⁹ (1840) 9 C. & P. 626. See note 53 below.

⁴⁰ Vol. 15, p. 817, Nos. 8919 and 8923.

⁴¹ *Op. cit.* p. 573.

⁴² C. L. J. (1934) vol. v, 2, pp. 242 *et seq.*

to acquit of the felony and to find a verdict of guilty of assault against the person indicated if the evidence shall warrant such a finding; and . . . the Court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years'.

This statute was enacted to amend the laws relating to offences against the person. At Common Law a misdemeanor could not be joined in the same indictment with a felony, and the consequence was that in all cases of alleged felonious offences against the person, if the prisoner was acquitted of the felony he was free altogether upon that indictment, and a fresh indictment was necessary. The object of this enactment, therefore, was to prevent this necessity and make provision for the conviction and punishment of the offender on the then present trial.⁴³

It was clear, therefore, that where an indictment charged a felony under this Act, the only assault which the Court could consider was not a Common Law assault⁴⁴ but a statutory assault within section 11 of the Act, which indeed envisaged a heavier penalty than was possible for assault at Common Law, carrying three years' imprisonment with possibility of hard labour and of periods of solitary confinement up to three months in any one year.⁴⁵

The exact interpretation to be placed upon section 11 soon began to exercise the Courts. In 1840, in *R. v. Guttridge*,⁴⁶ Parke B. said⁴⁷: ' . . . you ought not, under the late statute, to convict of a completely independent and distinct assault; but only of such an assault as is connected with the felony charged '. A few days later the question arose again in the case of *R. v. St. George*.¹¹ The indictment was for feloniously attempting to discharge a loaded pistol by drawing the trigger, etc., in various counts under sections 3 and 4 of the Act. The evidence established that the prisoner had been in fact prevented from drawing the trigger, and Parke B. ruled that the charge of felony could therefore not be supported.⁴⁸ On the question of assault the learned Baron, after his remarks about assault in general, said⁴⁹: ' My idea is that the prisoner can only be found

⁴³ See *R. v. Bird* (1851), 2 Den. 94, at p. 133, *per* Martin, B.

⁴⁴ See *R. v. Woodhall* (1872) 12 Cox 240, in which it was held that on an indictment for felony under 24 & 25 Vict. c. 96, s. 42, prisoner could not be convicted of common assault.

⁴⁵ Under s. 8.

⁴⁶ 9 C. & P. 471.

⁴⁷ At p. 474.

⁴⁸ At p. 489.

⁴⁹ At p. 491.

guilty under this Act of Parliament of that assault which was involved in, and connected with, the presentation of a loaded pistol. Suppose there was a common assault committed in the course of a dispute between the prisoner and the prosecutor, I do not think that the prisoner could be found guilty of that assault on an indictment charging him with the felony.' His Lordship, however, seems to have been of opinion that assault within section 11 could be committed even if the pistol were not loaded, but on counsel submitting that Mr. Justice Erskine had held in an unreported case that the pistol must be loaded, he desired the jury to inform him whether the pistol was loaded, and they found it to be so.

Baron Parke's interpretation of section 11 was confirmed by eleven judges in 1846 in the case of *R. v. Birch*, where it was said, '... the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment'.⁵⁰ In another report of the same case it⁵¹ is said, '... their Lordships also held that the 11th section ... applies wherever ... the jury, negating the felony, find guilty of the assault: provided always that the finding be in respect of that very same act which the Crown seeks to make felonious; identity being the question and not the intention of the prisoner to commit a felony'. This interpretation received emphatic confirmation in the subsequent case of *R. v. Bird*,⁵² in which every one of the fourteen judges, each of whom delivered a separate judgment at length, adopted the principle so laid down in *R. v. Birch*.

It was entirely in accordance with this principle that Parke B. had acted in the case of *R. v. St. George*. The indictment having alleged a felony with a loaded pistol, the prisoner could only be found guilty of assault with a loaded pistol. Turning now to the case of *R. v. James*³⁶ it will be found that the summing-up of Tindal C.J. is in exact accordance with this. The prisoner was charged in the indictment with feloniously attempting to shoot with a loaded rifle. Evidence established that the rifle was not loaded within the meaning of the statute: The learned judge said: 'I am of opinion that this was not a loaded arm within the statute and that the prisoner can neither be convicted of the felony nor of the assault. It is only an

⁵⁰ (1846) 1 Den. 185.

⁵¹ 2 C. & K. 194.

⁵² (1851) 2 Den. 94.

assault to point a loaded pistol at anyone, and this rifle is proved not to be so loaded as to be able to be discharged.'

It happens that this case of *R. v. James* was reported also in 3 L. T. (o.s.) 410, where it is expressly stated that counsel drew attention to the case of *R. v. St. George*. Is it conceivable that the learned Chief Justice, if he had regarded himself as enunciating a view of law contrary to that expressed by Baron Parke, would not have been at pains to explain his reasons? In fact, according to the reports, he said nothing at all to that effect. Therefore on all the grounds of principle, of authority, and of probability it can confidently be submitted that there is after all no conflict whatever between the case of *R. v. St. George* and the case of *R. v. James*, and it can be suggested that in future the doubts that have been expressed⁵³ should be erased from our books, and students be thus spared unnecessary perplexity.

In conclusion the following definition is offered for consideration:—

It is an assault at Common Law when any person intentionally, or recklessly, by active conduct threatens to apply unlawful physical force to the person of another in such a manner as to create in the mind of that other an apprehension that such force is about to be so applied.

⁵³ Certain other cases, occasionally referred to as contrary to *R. v. St. George*, all prove to be irrelevant to the present point: e.g. *Blake v. Barnard* (1840) 9 C. & P. 626, a civil action which turned entirely on a point of pleading. The plaintiff in his declaration had expressly alleged an assault with a loaded pistol and had thus saddled himself with the necessity of proving that the pistol was in fact loaded, which he was unable to do; the cases of *R. v. Brown* (1883) 10 Q. B. D. 381, *R. v. Duckworth* [1892] 2 Q. B. 83, and *R. v. Linneker* [1906] 2 K. B. 99, are all cases concerned not with assault, but with attempt, and the argument turned on the meaning of the words 'in any other manner', which occur in the relevant sections of the statutes under consideration.

THE PERSISTENT OFFENDER.

L. RADZINOWICZ.

THE persistent offender occupies, together with the juvenile offender, the central position in criminality, so that every investigation of the genesis and dynamics of his delinquency, and every elaboration of rational methods for curtailing his anti-social activities, must find a place among the fundamental tasks of modern criminology and penal policy. Hence, those provisions of the Criminal Justice Bill, 1938, which deal with the treatment of persistent offenders are undoubtedly of the greatest interest and of particular significance. They are also important because, unlike the other provisions of the Bill, they do not follow the lines set out by the course of evolution hitherto followed but absolutely break with the system established by the Prevention of Crime Act of 1908 (Part II), and they introduce one feature which is entirely new. As nearly all the modern Continental penal legislative systems have also introduced new modes of dealing with persistent offenders, an examination of the English system will be useful for comparative purposes.

The continued existence of the group of persistent offenders, that is, offenders who constantly or very frequently break the law, has long made it doubtful whether the application of normal repression can be effective in such cases. By normal repression is meant repression which does not take into consideration, when inflicting punishment, the entire criminal record of the delinquent but merely the single offence under trial, isolated from its predecessors; and the result is that only such a sentence is awarded as is appropriate to the particular offence under consideration. In order to arrange for a more effective protection of the community it has become necessary to abandon this system of dealing with persistent offenders: the principle of maintaining a due proportion between the degree of gravity in the particular offence under trial and the sanction inflicted can no longer be maintained in such cases. This consideration has made it incumbent to apply the system of enhanced repression, that is, to impose a punishment more severe than that envisaged by the code for the offence under trial just because of the previous, heavily marked criminal record of this category of offenders.

In this field, the classical doctrine of penal law has been infringed in very striking fashion: penal repression has been shunted to new lines under the influence of the utilitarian consideration of protecting society and of preventing crime.

Under this system of enhanced repression, judges at first did not hesitate to inflict punishments which were even inhumane. But later, with the reformation of the administration of penal justice and its establishment upon a more legalistic and humane basis, that system led, in the case of certain categories of recidivists, to the result that in practice merely longer prison sentences were meted out in automatic fashion within the limits imposed by the law. Comparatively soon, however, and undoubtedly under the influence of new trends in criminology and penal law, more and more force was acquired by the doctrine that the system of enhanced repression towards persistent or habitual offenders was not an efficient one. Improved methods of compiling criminal statistics likewise had some influence in this matter as they facilitated a better understanding of the scope and incidence of recidivism. According to this doctrine, the system of enhanced repression is really nothing else but a system of normal repression quantitatively intensified, whilst what is needed with regard to this category of offenders is the elaboration of a qualitative system of repression. The central point of the problem lies in the need for a shift of repressions as such to a different plane. Repressions with regard to such offenders should be based, not as hitherto on objective criteria, *i.e.*, on an estimation of the gravity of the specific offence committed, but on subjective criteria, that is to say, on the intensity of the danger presented to society measured by the probability of the recidivist committing further offences.¹ The conclusion that has been drawn is that neither ordinary nor enhanced punishment but an *indeterminate sentence* is the most suitable sanction for combating the criminality of this group of offenders. It was in such wise that arose the new system of repression against these recidivists—what is known as the system of preventive detention.²

¹ Thus, for instance, the Report from the Departmental Committee on Prisons (London, 1895) formulated this problem as follows: 'To punish them for the particular offence in which they are detected is almost useless; . . . the real offence is the wilful persistence in the deliberately acquired habit of crime . . .' (p. 31).

² Naturally, this system does not exclude the possibility of applying normal or enhanced repression towards certain groups of recidivists. Most modern criminal legislative systems have adopted all three modes in order to attain a greater degree of individual treatment in legislation.

This new system did not, however, find expression in any homogeneous formula in the field of legislation. From the very first, three separate systems of legislative codification can be distinguished: the Swiss, the Norwegian and the English system. According to the Swiss system, first elaborated by Professor Stoss in his suggested project for the Swiss Criminal Code of 1893 (art. 40), certain persistent offenders might, instead of receiving a prison term, be sentenced to detention in special establishments for a period of time lasting from ten to twenty years, but with the proviso that they might be conditionally released after the lapse of five years. The Swiss system therefore introduced the system of preventive detention, in which an indeterminate sentence supplanted a fixed term of imprisonment. This is what has been called the 'single-track' system, and, although the project of 1893 was later amended, the same system appeared in all the subsequent projects (in 1894, 1896, 1903, 1908, 1916, 1918, and 1928). The essence of the Norwegian system, elaborated in the Criminal Code of May 22, 1902 (par. 65), is that persistent offenders belonging to certain categories of recidivists may, after serving the term of imprisonment inflicted upon them, be detained in the prison so long as the danger they present continues to exist. Such detention may not, however, exceed more than threefold the original term to which they were sentenced, and in no case may it last longer than fifteen years. Thus, under the Norwegian system, the punishment is transformed into a specific kind of indeterminate sentence. In spite of basic differences, it has common features with the Swiss system in that it envisages a single-track type of repression. The fundamental trait of the English system is that it has introduced what is known as the 'double-track' system, as elaborated in the Prevention of Crime Act of 1908 (Part II). According to this law, certain categories of habitual criminals must, after serving their fixed sentence, undergo preventive detention lasting at least five years and not more than ten. Thus, the two systems of preventive detention are: an indeterminate sentence inflicted instead of a fixed term of punishment (the single-track system); and a term of imprisonment plus an indeterminate sentence ('double-track').³

We now have nearly fifty years of actual experience of these systems, and it should be easy to ascertain which of them

³ It is of interest to note that some of the Swiss cantons have introduced both the single and the twofold system, leaving the application of one or the other to the discretion of the Court (see, *e.g.*, law of May 5, 1922, in Canton of Glarus).

has found acceptance in criminal legislation. The Norwegian system was repealed in Norway itself by the law of October 22, 1929, which simultaneously introduced the 'double-track' system. Although the Swiss system was upheld in all the successive projects of the Swiss Criminal Code and was adopted by the well-known project of the Italian Criminal Code drawn up by Ferri in 1921, it exists, *de lege ferenda*, so far as I know only in Sweden (law of April 22, 1927) and in Hungary (law of January 31, 1928). On the other hand, nearly all the other countries on the Continent have adopted the English system (*i.e.* prison term plus preventive detention, the two not to run concurrently but in succession).⁴

But it is a striking fact that although the Continent has largely adopted the English 'double-track' system, Great Britain has, on the strength of her own experience in this field, now decided to abandon it and to introduce a system closely approaching that elaborated by the Swiss system. The relevant provisions of the Criminal Justice Bill purport to repeal Part II of the Prevention of Crime Act, 1908, and with regard to certain categories of persistent offenders introduce the corrective training sanction and also the preventive detention sanction; these, however, if applied, must be applied 'in lieu of and not in addition to sentences of imprisonment or penal servitude'.⁵ Thus after thirty years it is proposed to abandon the 'double-track' system for the 'single-track'. In fact, the 'double-track' system with regard to certain categories of persistent offenders as it is being applied in modern criminal legislation is open to numerous objections.

First, the twofold nature of the repression arouses serious doubts. No doubt, in the case of some categories of persistent offenders the system of enhanced repression is inadequate, and it is necessary to apply preventive detention (by the application of an indeterminate sentence conditioned by the degree of danger presented by the given offender). But it is difficult to explain why such preventive detention should be applied only in addition to the basic term of imprisonment. For it is clear that the preventive detention sanction is a more effective means of

⁴ See, *inter alia*, Denmark (Criminal Code of April 15, 1930), Norway (law of February, 22, 1929), Holland (law of April 5, 1929), Italy (Criminal Code of October 19, 1930), Belgium (law of May 11, 1930), Germany (law of December 24, 1933), Poland (Criminal Code of November 11, 1932), Finland (law of May 22, 1932), Latvia (Criminal Code of 1933), Yugoslavia (Criminal Code of January 27, 1929), France (draft of new Criminal Code of 1932), and Czecho-Slovakia (draft of the Criminal Code of 1926).

⁵ See Criminal Justice Bill (Bill 4). Explanatory and financial Memorandum, p. vii.

protecting the public and of reforming the persistent offender than the prison term inflicted as a punishment. The query therefore arises: Why should not the former at once be applied and the basic punishment eliminated altogether? The introduction of the double-track system on the Continent is explained by the influence of the classical doctrine, *viz.* that failure to inflict punishment is contrary to what is regarded as the fundamental tenet of the administration of justice, namely, that it is essential in every case to compel an offender to pay a penalty proportionate to his moral responsibility and to the gravity of the offence which he has committed apart from any other consideration. It is this reason, a relic of the old *lex talionis*, which has been the reason for the adoption of the 'double-track' system on the Continent.⁶

However, this twofold system is not only irrational but also undoubtedly contributes to paralyse the whole system. For it tends to check judges from applying preventive detention in cases where it would be useful because they are liable to consider it unjust to inflict a double repression. In addition, this system causes a number of serious difficulties to arise in the field of penitentiary practice. The twofold system is based on the postulate that there is a basic difference between the prison term and preventive detention as a punishment. In this view, an institution for preventive detention ought to be so organized that it actually differs from the prison in which the delinquent has served his punishment before beginning his term of preventive detention. Unfortunately, throughout Europe every attempt in this direction appears, so far as is known, signally to have failed.⁷ In the majority of cases, preventive detention institu-

⁶ The introduction of the twofold system by the Prevention of Crime Act (1908, Part II) is to be explained by quite other considerations. The Bill presented before Parliament by Gladstone proposed the single-track system (absolutely indeterminate sentence), but Parliament, the more effectively to protect the rights of the individual and to restrict the application of the proposed law only to exceptional cases, not only insisted that the preventive detention sanction should be determinate (minimum five years and maximum ten years) but also made its application contingent on the last offence detected being a serious crime for which penal servitude must be inflicted.

⁷ See in connexion with the Austrian attempt: Exner, *Die Theorie der Sicherungsmittel*, 1914, pp. 157—161; with the German attempt of 1927: Freudenthal, *Reform des Strafrechts*, publ. by Anschrott Cohlrausch, 1926, p. 169; with the German attempt of 1934: Exner, in a paper read before the Berlin Congress of 1935 (Section II, Problem 2); in connexion with the Belgian attempt in 1930: Cornil, *La loi de defense sociale*, etc., Brussels, 1930, pp. 78—79; with the Italian attempt of 1932: Dybwad, *Theorie und Praxis des faschistischen Strafvollzugs*, Borna, 1934, p. 59. See also new attempts to go beyond the twofold system established by the Italian Criminal Code of 1932: Grisogni, *Corso di diritto penale*, p. 121; Marsico, *Natura e scopi delle misure di sicurezza*, in '*Rivista di dir. penitenz.*', 1933, No. 6, p. 1235; Antolisei, *Pene e misure di Sicurezza*, Sassari, 1933, pp. 24—25. Likewise the deliberations at the Inter-

tions have coincided with ordinary prisons (in practice often prisons of very bad types). It is true that in England the first preventive institution was set up (at Camp Hill) in a separate building, and that a new regime was adopted for the treatment of the inmates which differed from that in operation in the ordinary prisons of the time: but at the present day, as the result of general prison reform, this difference has disappeared: indeed, there are at present some prisons for ordinary offenders in which the system is much more advanced than in the present preventive institution (now at Portsmouth). In any case it may well be asked: Why should reformatory methods be unhesitatingly applied to persistent offenders while the prison administration fails to show anything like the same zeal and enthusiasm with regard to other groups of offenders who in fact give much more promise of successful adaptation to social life?

It is not only with regard to the effectiveness of the twofold system of repression that serious doubts exist. They also arise when we come to examine the type of preventive detention which has been adopted. There can be no doubt that such sanction must be based on the principle of the indeterminate sentence. But the question immediately arises: What type of indeterminate sentence is most advisable in the given case? For there may be either the absolutely indeterminate sentence, whereby the delinquent may conceivably be kept in preventive detention for life; or the relatively indeterminate sentence, where either a maximum is fixed, or a period between a minimum and a maximum. If it be affirmed that the last type of indeterminate sentence is most desirable, it becomes necessary to define what minimum and maximum periods should be applied.

Modern criminal legislation has gone very far in the application of indeterminate sentences to certain categories of persistent offenders so far as length of term is concerned. Absolutely indeterminate sentences to preventive detention have been introduced in Denmark, Norway, Hungary, Finland, Poland, Italy and Germany, *i.e.* preventive detention in these countries may be in effect a life term. Those countries which have adopted the relatively indeterminate sentence apply a very high maximum and minimum term. Thus, the maximum in Holland is ten years, ten or twenty years in Belgium, ten years in Latvia and Yugoslavia, and a like period in Great Britain. The minimum term of preventive detention is four years in

national Penitentiary Congress at Berlin, 1935, failed to reveal any basic differences between prison punishment and preventive detention sanction in spite of the great efforts made to find some.

Denmark, ten years in Sweden, two, three or four years in Italy, three years in Germany, five years in Poland, three years in Hungary and Finland, five years in Latvia and Great Britain, and three years in Yugoslavia.

The introduction of indeterminate sentences presents a number of dangers which cannot be lightly disregarded in a rationally conceived penal policy. Such sentences signify in effect that the administration of penal justice passes from the plane of law to that of administration pure and simple; that enormous authority is given to the prison administration; that the liberation of the offender is made contingent on a precise diagnosis of the danger he presents to society although this diagnosis is made under the artificial conditions of prison life; that very long sentences to privation of liberty are enforced although their reformative influence may be very problematical. If great care is not exercised in the application of an indeterminate sentence, there is a danger of a measure (the object of which is to provide a more effective means of the protection of society) becoming an instrument of social aggression and causing a weakening of the basic principle of individual liberty.⁸

Further, under the 'double-track' system the preventive detention sanction is a particularly sharp repression because it follows immediately upon a punishment which in most cases is in itself a severe one. Again, preventive detention depends upon a prison system which, under existing conditions, everywhere still leaves much to be desired in point of reformative efficiency.

The foregoing remarks by no means signify that the indeterminate sentence should have no place in the modern system of penal repression. On the contrary, experience shows that it yields excellent results when properly normalized and applied (as, *e.g.*, in the Borstal system). But the crux of the problem lies in its rational application. In the case of certain categories

⁸ This largely explains why judges so unwillingly inflict indeterminate sentences, particularly in those countries where the administration of penal justice is based on the doctrines of liberalism. Thus, for instance, although the law in Norway gave the Courts great powers with regard to certain groups of recidivists, for many years the judges took no advantage of the stipulations of the relevant law. See in this connexion, Garçon in the '*Revue Penitentiaire*', T. 33, p. 342. Undoubtedly in Great Britain, too, the same reason was at work: see in this connexion, Foltin, *Die chronisch erhöht Gefährlichen*, Vienna, 1927, pp. 24—33, and p. 127. It is interesting that even at present, the judges in Germany are showing some opposition; this was stated by Dr. Freisler in a paper read at the International Congress at Rome, 1938. This author, Secretary of State at the Ministry of Justice in the Reich, affirmed that the indeterminate character of preventive detention 'caused difficulties to arise in connexion with the psychology of the judges', but (he added), 'which we are trying to overpower'. See Freisler, *L'esperienza delle misure di sicurezza in Germania*, in '*Rivista di Dir. Penitenz.*', 1938, No. 5, p. 1107.

of persistent offenders, only relatively indeterminate sentences should be applied and the maximum and minimum terms should not be very high.

Finally, a comparative analysis indicates that the preventive detention system has been introduced in too mechanical a manner. A uniform type of preventive detention has been adopted in modern criminal legislation although the group of persistent offenders is obviously far from being uniform in character. No exhaustive examination of this problem will be undertaken in this place, and, in fact, a few very general remarks will suffice to demonstrate how very variegated this group of delinquents is. Indications to this effect are even afforded by the terminology used in the relevant modern Continental legislation: 'professional criminals', 'habitual criminals', 'multiple recidivists', 'dangerous professional or habitual criminals', 'incurable offenders', 'offenders with instinctive criminal tendencies', 'offenders with a bias towards crime'. And here are a few examples of English terminology in this connexion: 'young habitual offender', 'hardened offender', 'hard core of the criminal problem', 'persistent offender', 'aggressive criminal', 'persistent petty offender', 'incurable type', 'advanced dangerous criminal', 'substantial and serious criminal', 'really habitual criminal', 'the most incurable class of offenders', 'weak-minded habitual offender'. Each of these expressions largely implies quite a different criminological content and at the same time they fully suffice to demonstrate how very varied the persistent offenders are as a group. The degree of intensity exhibited by recidivist crime, the qualitative nature of the offences, the extent of the danger presented to society, the age, the mind of the offender, his biological and social background and pattern, susceptibility to reformatory influences—all these are factors amidst a host of others which may appear and do appear with varied force and in diverse combination. They make it incumbent to adopt not a penal-administrative approach but rather a criminological and social one in dealing with persistent offenders.

In view of the above, special care must be taken when using the expression 'incurable' offender. The classification of an offender as 'incurable' merely because in the majority of cases he commits new crimes is an erroneous diagnosis from the criminological point of view. Permanent recidivism may be the result of a mixture of external causes or of badly applied methods of reformation, and these factors, of course, have nothing in common with 'incurability'. The so-called

incorrigible offenders are very often simply offenders who have not been corrected.⁹ In view of the highly complicated aetiology of the criminal activity of the so-called persistent offenders, the application of a single type of indeterminate sentence by modern preventive detention systems would appear to be too mechanical and a specious simplification.

The result is that the system applicable to certain categories of persistent offenders under the new Criminal Justice Bill constitutes a very great step forward towards a more rational solution of this complicated problem. The following provisions of the Bill merit special emphasis: (a) the system to be established has abandoned the complex, artificial and irrational system of twofold repression, supplanting it by a single-track one (corrective training and preventive detention instead of a term of imprisonment as punishment)¹⁰; (b) the new system applies the indeterminate sentence, but has adopted the relatively indeterminate type (both with reference to corrective training and to preventive detention, the Bill fixed minimum and maximum limits which the Courts may not exceed when sentencing offenders); (c) the relatively indeterminate sentence has been introduced in a comparatively moderate form (corrective training may be imposed within the limits of two to four years, and preventive detention within the same limits but in some cases the maximum may be advanced to ten years)¹¹; (d) conditional release is also envisaged (after the lapse of three-quarters of the sanction imposed) with the application of supervision, whilst the Secretary of State is empowered to allow such release at any time without restriction as to the minimum proportion to be served by the offender¹²; (e) with a view to

⁹ See, in connexion with the danger of too freely using the term of 'incorrigibility', the excellent paper read by Dona Concepcion Arenal at the International Penitentiary Congress at St. Petersburg in 1890 which has to this day maintained its interest. See *Actes du Congres Penit. Int.*, St. Petersburg, 1890, vol. iii, pp. 507—508.

¹⁰ The English system goes still farther along the lines of single-track action than a large number of other systems of the same type. Under the Swiss system, the punishment must be first inflicted after which it is supplanted by preventive detention. According to the Criminal Justice Bill, when the Court deems it necessary to apply corrective training or preventive detention, this is applied immediately without passing sentence of punishment.

¹¹ The possibility of depriving such offenders of their liberty even for the period of ten years, is open to objections, particularly when it is considered that, according to the provisions of the Bill, the Courts may very often mete out preventive sanction for such terms. During the debate in the House of Commons, some of the members urged that the new law may have gone too far in this direction. See Official Report, November 23, 1938, col. 295, vol. 342, and Official Report, December 1, 1938, col. 638, vol. 342.

¹² The Bill, however, says nothing of after-care organization. It would appear, on the other hand, that having introduced the preventive detention system, the State is under an obligation to guarantee first-rate after-care facili-

arranging for more efficient action with regard to certain specific groups of persistent offenders, the new system introduces a more differentiated indeterminate sentence, fixing three basic types (corrective training, preventive detention, and enhanced preventive detention); (f) finally, the new system has not followed the lines of a mere elimination from society of these groups of persistent offenders, but has recognised as the fundamental element in the execution of this type of sanction the principle of intensive reformatory treatment.¹³ These provisions of the Criminal Justice Bill—so far as the system adopted for dealing with some categories of persistent offenders is concerned—undoubtedly place it in a leading position among the present criminal legislative systems of the world.¹⁴ The Bill undoubtedly represents an important phase in the process of reform which has for some time past been taking place in the English system of penal repression.

It is, of course, difficult at present to foresee how this new system will develop after its incorporation into the mechanism of penal repression in Great Britain. It is all the more risky to make any forecast in this connexion when we recollect the great hopes placed in the preventive detention system established by the Prevention of Crime Act of 1908 (Part II), and how

ties. As the State and the community, for their more efficient protection, introduce such sharp sanctions, they must at the same time do all that is possible to stop such offenders returning to a life of crime. Institutions for corrective training and preventive detention should possess after-care organizations identical with those applied in the case of the Borstal system.

¹³ In this respect, the Bill is not quite clear. Thus, in the case of corrective training, the Bill distinctly speaks of 'reformation' (and places the prevention of crime in a secondary place); on the other hand, in the case of preventive detention, the Bill speaks only of 'protection of the public'. Sir Samuel Hoare stated clearly in his speech that the reformatory object should be taken into consideration not only in the execution of preventive detention fixed for a period of from two to four years, but should even be applied when this detention is to last ten years. See Official Report, November 29, 1938, col. 281 and col. 282. A similar point of view was taken up by Mr. Geoffrey Lloyd, Under-Secretary of State for the Home Office, see Official Report, December 1, 1938, col. 730—731. Members of Parliament demanded that in these establishments an intensive reformatory system be introduced along the lines of the Wakefield system. Undoubtedly, the Bill should be made clearer, especially in view of the fact that Clause 34 is to some extent incompatible with Clause 16, which clearly states that 'reformation' is to be the object both of corrective training and of preventive detention. Clause 16, however, also contains a provision which seems dangerous, namely, that persons condemned to such sanction 'shall be allotted to a prison or part of a prison set apart for the purpose'; but what is needed is establishments which fundamentally differ from prison institutions.

¹⁴ In connexion with this, mention must be made of the excellent Report of the Departmental Committee on Persistent Offenders (1932, Cmd. 4090), which in very lucid fashion and searching manner has examined the entirety of the problem and has elaborated the guiding lines which the Criminal Justice Bill has closely followed. Very interesting, although perhaps only too often forgotten, is the Report from the Departmental Committee on Habitual Offenders, Vagrants, Beggars, Inebriates and Juvenile Delinquents (Scotland), 1895, Cmd. 7758.

in practice these hopes have not been realized.¹⁵ But it is quite certain that the present system is incomparably more rational, apart from the fact that in general much in the system of penal repression has been changed in Great Britain. The undoubtedly milder nature of general repression and the development of more intensive reformatory action in the treatment of juvenile and fortuitous offenders have made it essential to devote closer and more careful attention to chronic criminality if the development of the whole system of penal policy is to proceed along harmonious lines. Necessarily, the success of the new system will largely depend on the mode of its application by the Courts and on the manner in which the prison administration carries it out.

In any case, it would be well to bear in mind that even if the best possible use is made of the new system, the problem of persistent criminality will by no means be thereby solved. At best, the Bill copes only with a relatively small fraction of recidivist and persistent criminality¹⁶; an enormous mass of recidivists, numbering tens of thousands, will remain unaffected by the working of the new system.¹⁷ And the central point of the whole problem, as it happens, is to elaborate and apply a rational and efficient line of action with regard to this great reservoir of criminality from which the persistent offenders are

¹⁵ The Courts apply preventive detention in from thirty to forty cases per annum on the average, and in nearly every case apply the sanction for the minimum period of five years.

¹⁶ In Denmark, Norway and Sweden, the figures in respect of offenders sentenced to preventive detention do not exceed fifty cases. In Belgium the figure is higher but likewise insignificant. This sanction is more usual in Poland, in Italy and in Germany. In Poland, during the period 1934-38, it was applied to about 700 cases; in Italy (1931-37) to about 500 cases, and on a much larger scale in Germany, where it was applied to about 14,000 cases during 1934-37 (in half the cases, preventive detention was applied and in the other half, detention in compulsory work-houses). These figures, even the German ones, however, remain in no direct proportion to the data on multiple recidivism. In 1932, for instance, in Germany, out of a total of 564,479 persons finally sentenced, there were 242,396 recidivists, of whom 72,129 had been sentenced more than four times previously. Owing to changes in the methods of registration in criminal records, the number of recidivists was artificially reduced and is really considerably larger.

¹⁷ English judicial statistics of crime do not consider the factor of recidivism (up to the World War it was possible to establish the number of previous convictions of persons convicted in assizes and quarter sessions). At present, prison statistics take account only of prisoners 'with previous proved offences' and 'previous sentences of imprisonment'; the first category, of course, gives a fuller picture of recidivism than the second. In 1936, out of 100 prisoners there were 75.1 who had previously committed offences, whilst 52.9 had been previously sentenced to ordinary imprisonment or penal servitude; of these more than a half of the prisoners had been 'known to have more than five previous proved offences', and about 40 per cent. had previously been sentenced more than five times to deprivation of liberty. Lack of data on recidivism in English criminal judicial statistics is a very serious defect.

recruited. These offenders constitute a relatively advanced stage on the path of crime, the initial yet equally important stages of which lay through juvenile delinquency, criminality during early youth, fortuitous offences, and less serious forms of recidivism. The problem of the persistent offender is in origin and in function bound up with these problems.¹⁸

¹⁸ It is not by mere chance that in the great majority of cases the beginnings of the criminal activity of professional criminals and persistent offenders date back to very early youth. Roughly speaking nearly 30 per cent. of those sentenced were condemned for the first time before seventeen years of age and 70 per cent. before the age of twenty-one. This is so also in the material provided by various countries; see, *e.g.*, German material: Schurich, *Lebensläufe vielfach rückfälliger Verbrecher*, 1930, p. 134; Polish material: Batawia, *Nieproprawni przystępcy*, in 'Archiwum Kryminologiczne', vol. ii, Nos. 3—4, p. 462; Russian material: Tarnowski, *Wielokrotni recydywiści*, in 'Journ. of Ministry of Justice', 1915, No. 2, pp. 144; English material: Cyril Burt, *The Young Delinquent*, 1925, p. 218; Goring, *The English Convict*, 1919, p. 123. There can be no doubt that if these investigations were conducted not only by the method of criminal statistics, which considers only formal recidivism, but also with due consideration of the method of individual examination, it would appear that the process of growth of criminal activity and the formation of the criminal pattern is on a very much larger scale.

CONFLICTS OF LAW IN MATTERS OF UNJUSTIFIABLE ENRICHMENT.¹

H. C. GUTTERIDGE and K. LIPSTEIN.

THE situation which is created when rules of quasi-contract are in conflict has been neglected by English writers and has also received little attention on the Continent. It is possible, no doubt, to explain this lack of interest on the ground that the question is not one which occurs very often in practice. The various Continental rules relating to quasi-contract do not, in substance, differ widely from one another. Further, the somewhat narrow view of quasi-contractual liability hitherto taken by English law has probably discouraged foreign creditors from pressing claims of this type in our Courts. In particular, English law does not, in principle, recognise the rights of a *negotiorum gestor*² and the right to the restoration of an unjustified enrichment at common law must still be regarded as the subject-matter of a controversy in which we do not propose to take sides. It would, however, be unwise to dismiss the question of conflict as being in this instance of no practical importance when we have regard to the growth of interest in quasi-contract which has been a feature of the literature of English law during the last two or three years,³ and to the possibility that English law may undergo revision in this direction. Changes in the rules of a system of law cannot be made *in vacuo*, and due regard must be had to possible repercussions in the international sphere.

The objects we have in mind are to attempt an exploration along comparative lines of such rules of conflict as can be found in the different systems and to make certain suggestions as to

¹ This attempt to deal with the question is a by-product of the discussions in the Cambridge Seminar on Comparative Law during the Michaelmas Term, 1938, and the Lent Term, 1939. We desire to take this opportunity of expressing our gratitude to the members of the Seminar for the help which we have received from them and in particular to E. Lange (Trinity College and the University of Upsala) and E. von Hantelmann (Trinity College and the University of Göttingen).

² See *Leigh v. Dickeson* (1885) 15 Q. B. D. 60.

³ See Winfield, *The Province of the Law of Tort*; Lord Wright, *Sinclair v. Brougham*, 6 C. L. J. 305; Jackson, *The History of Quasi-Contract*; Friedmann, 'The Principle of Unjust Enrichment', *Canadian Bar Review*, xvi, 247, 369; Logan, 'Restatement on Restitution', 2 *Modern Law Review*, 153. Cf. Holdsworth, 'Unjustifiable Enrichment', 55 L. Q. R. 37; Gutteridge and David, 'Unjustified Enrichment', 5 C. L. J. 204.

the principles which, in our view, are best adapted to secure a satisfactory solution of the problem which is involved when a claim submitted to an English Court is based on an unjustifiable enrichment arising abroad. The first part of our study will deal with the position at Common Law, whilst the second part will be concerned with the rules of Continental Law. The third part will contain the conclusions at which we have arrived, though not without considerable hesitation.

THE ATTITUDE OF THE COMMON LAW.

H. C. GUTTERIDGE.

The English text-book writers have very little to say about conflicts in matters of quasi-contract. Dicey,⁴ who devotes only a short note to the question, is chiefly concerned with the problem of 'classification' and leaves it, otherwise, very much in the air. He refers in a footnote, without any discussion of its import, to a solitary case⁵ and gives no indication as to the rules which should, in his opinion, govern the matter. Westlake⁶ treats the question with more respect but with a lack of precision. He does not attempt any analysis of the different states of fact which may give rise to the problem in practice, nor does he discuss in any detail the rules to be applied. He confines himself to the statement that there can be little doubt that the proper law of a quasi-contractual obligation ought generally to be drawn from the place with which the act that occasions it has the most real connexion. Burge's *Colonial and Foreign Law* contains a somewhat obscure passage⁷ dealing with a very recondite aspect of the matter, but is otherwise confined to a short statement of the views of certain Continental authors.⁸ Baty dismisses the question as being 'comparatively unimportant'.⁹ Foote and Cheshire ignore the problem altogether, as also do the editors of the relevant title in the Halsbury edition of *Halsbury's Laws of England*.¹⁰

⁴ *Conflict of Laws*, 5th ed. at p. 783.

⁵ *Batthyany v. Walford* (1887) 36 Ch. D. 269.

⁶ *Private International Law*, 7th ed. § 235. He refers to *De Greuchy v. Wills* (1879) 4 C. P. D. 362.

⁷ 2nd ed. vol. ii, p. 39.

⁸ *Ibid.* pp. 484 and 485.

⁹ *Polarized Law*, pp. 51 and 52.

¹⁰ Dr. Frankenstein (*Internationales Privatrecht*, ii, p. 392, note 31) suggests that *Re Bonacina* [1912] 2 Ch. 394, may, perhaps, be treated as a case of the application of the doctrine of unjustified enrichment, but this was not the issue and the decision proceeded on other grounds.

In the American Restatement of the Conflict of Laws the choice of law in quasi-contract is said to depend in the case of a benefit on the law of the place where the benefit is conferred¹¹; in cases of unjustifiable enrichment the law of the place of enrichment is the determining factor.¹² American writers do not, however, deal with the question at any length. Beale's treatment of the matter is somewhat guarded. He says: 'It seems clear that a right arising on quasi-contract is determined by the law of the place where the benefit or other enrichment is rendered. There seem to be no cases in which the question of Conflict of Laws has been raised.'¹³ Wharton deals very briefly with the point, but is inclined to favour the application of the *lex loci actus* giving rise to the claim.¹⁴ Story and Goodrich are silent.

Certainly, so far as English law is concerned, there is an absence of authority which, however inconvenient it may be, has at least the advantage of leaving the way open for a solution which seeks to reconcile the requirements of logic with those of expediency. It is not always possible to deal with matters of conflict in a way which is either elegant in the legal sense or logical. Rules which are designed to have extra-territorial effect must often be moulded on lines which offend an orderly mind because their purpose may be to meet a situation which is complicated by differences in the structure of society and differing economic methods.

It is possible to simplify the problem somewhat by the elimination of certain aspects of maritime law which are said to possess a quasi-contractual character. Whether general average and salvage are quasi-contractual in nature does not seem to be open to doubt,¹⁵ but, in any event, maritime law has, in this instance, found its own solution of questions of conflict¹⁶ and it would seem that no useful purpose is served by the introduction of rules of conflict into questions which are so essentially

¹¹ § 452.

¹² § 453.

¹³ Treatise on the Conflict of Laws, 1935, vol. ii, p. 1429.

¹⁴ Treatise on the Conflict of Laws, 2nd ed. at p. 484.

¹⁵ See Winfield, *The Province of the Law of Tort*, p. 139; Holdsworth, 'Unjustifiable Enrichment', 55 L. Q. R. 37. Cf. C. L. J. vol. v at pp. 224, 225.

¹⁶ In the case of general average the accepted rule is that the proper law is that of the port at which the adventure is lawfully terminated. Moreover the York-Antwerp Rules, 1924, which are the product of unification, are applicable in the majority of instances of conflict. Salvage is covered to some extent by international agreement. (See Maritime Conventions Act, 1911, ss. 6 and 7; Air Navigation Act, 1920, s. 11.) The outstanding problems are being considered by the International Maritime Committee and C. I. T. E. J. A. (See Bulletin No. 102 of the International Maritime Committee, 1938.)

international in character that conflicts are best solved by the process of unification of the law.

So far as English law is concerned it is also possible to eliminate the test of the nationality of the parties which has been suggested by Continental jurists as applicable in certain circumstances. A solution of this nature would be unacceptable for reasons which have been stated so often that it is unnecessary to repeat them.

This objection does not apply to the test of the domicile of the parties, but domicile raises difficulties of classification which should be avoided whenever possible. It is submitted that as the law now stands an English judge has a free hand to select any test by which conflicts of quasi-contract may be resolved, but discussion of the principles which, in our view, should govern his choice are, we think, best deferred until the rules of Continental law have been examined. There are, however, certain questions of a special character which arise if the problem is regarded solely from the angle of English law, and it will be convenient to deal with these at once.

In the first place, difficulties may conceivably arise as to the classification by an English Court of quasi-contractual claims of foreign origin. In *Batthyany v. Walford*¹⁷ it was argued that the claim was not quasi-contractual but delictual both in Austrian and in English law, in which event the English Statutes of Limitation would have barred the claim. It is submitted, however, that an English Court applying either the *lex fori* or the foreign law to the classification would find no difficulty in assigning to the realm of quasi-contract foreign obligations, imposed by law, which do not belong either to the domain of contract or of tort.

There are, it is true, certain claims of a quasi-contractual nature which are recognized in Continental law but have no counterpart in our system, *e.g.*, claims by a *negotiorum gestor* or the claim by the holder of a bill of exchange who has lost his remedy on the bill owing to the absence of protest or notice of dishonour. Will an action lie in England to enforce claims of this kind? The answer would seem to be in the affirmative. The matter was put very clearly by Cardozo, J., when he said that 'a right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs

¹⁷ *Ubi supra*. See also Dicey, *op. cit.* p. 783 and Beckett, 'Classification in Private International Law', *British Year Book of International Law*, 1934, vol. xv, p. 62, note 4.

to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home'.¹⁸ In *Batthyany v. Walford*¹⁹ an English Court was requested to give effect to a rule of Austrian law imposing liability for deterioration of the property on the life tenant of an estate in Hungary subject to a *Fideikommis*. There is no strict analogy in English law to this liability, though it is, perhaps, akin to liability for 'waste', but the Court of Appeal found no difficulty in enforcing it. It was treated as being quasi-contractual in nature and therefore not subject to the English Statutes of Limitation.

A further problem arises which is of some difficulty owing to the absence of direct authority. If the English Court decides that it will enforce the quasi-contractual right based on foreign law, what is the remedy to which the plaintiff is entitled? Is he entitled to the remedy given to him by the foreign law or must he be content with the remedy, if any, provided by the *lex fori*?

The point may be illustrated in the following way. Let us suppose that, as the result of the labours of the Law Revision Committee, the rule in *Chandler v. Webster*²⁰ were to be altered so as to allow the recovery of money paid in advance under a contract which is subsequently frustrated. Let us also suppose that the reforming English statute lays it down that in such a case the person paying in advance is entitled to recover the whole of his advance, but that under the foreign law which the English Court decides is to be applied to the quasi-contract in the circumstances of the case, the claimant is entitled to recover only the amount of his advance less any expenses incurred by the other party in connection with the transaction. Which rule is to prevail? This is a question which we propose to examine when framing our conclusions.

THE ATTITUDE OF THE CONTINENTAL LEGAL SYSTEMS.

K. LIPSTEIN.

Every approach to the problems of private international law from a comparative point of view must of necessity envisage

¹⁸ *Loucks v. Standard Oil Co.*, 224 N. Y. 99, cited by Unger, 'The Place of Classification in Private International Law', *The Bell Yard*, No. xix, p. 7. It cannot be said that it is contrary to the policy of English law to enforce quasi-contractual rights based on unjustifiable enrichment. Many claims based on this ground are in fact recognized. See 5 C. L. J. at p. 226 and L. Q. R. vol. 55 at p. 44.

¹⁹ *Ubi supra*.

²⁰ [1904] 1 K. B. 493.

the differences of basic conceptions between English and Continental law. Quasi-contractual obligations in Continental law are based on a universally recognized principle of natural justice,¹ and if they are often classified as being quasi-contractual, this expression is used to distinguish them from obligations arising in contract or tort rather than for the purpose of assimilating them to contract. In particular the action for unjustifiable enrichment is an action *ex lege* which is frequently resorted to in order to smooth out hardships created by the rigidity of the law, and though it is often applied in connexion with contracts it does not presuppose a contract.

The classification of unjustifiable enrichment as a quasi-contract and its frequent connexion with a contract have induced some Continental writers to regard claims arising out of such enrichment as contractual. Laurent² and Weiss³ favour the French rules of conflict which are applied to contracts, *i.e.* the national law, if both parties are of the same nationality, and the *lex loci contractus* if they are not. Despagne,⁴ however, makes the pertinent observation that, apart from any intention of the person who is impoverished to recover what he has paid if it should prove not to be due, the intention of the person enriched must also be considered. As it is highly improbable that the latter can ever have intended to return that which he receives whether it be due or not, for otherwise he would not have accepted it, a presumption of intention becomes necessary in practice.⁵ If the person enriched acts in bad faith the transaction takes on the complexion of a tort rather than that of a contract. In any event it will be necessary to imply a contractual relationship, and this involves a cumulation of fictions which seems to be inadmissible. Laurent's attempt to introduce his doctrine into Belgian municipal law was unsuccessful as a draft law prepared by him for this purpose was rejected.⁶

In Germany the problem appears in a somewhat different form. Gutzwiller⁷ and Wolff⁸ hold the view that every

¹ Fiore (1900), *Clunet* 27, 451; Pillet-Niboyet, *Manuel de droit international privé*, ii, 610; *Cass. civ.* 23. 2. 1891; *D.* 1892. 1. 29; *S.* 1895. 1. 78.

² *Droit civil international*, viii, p. 9, quoted by Fiore, *op. cit.* 455.

³ *Traité théorique et pratique de droit international privé*, iv, pp. 387—90.

⁴ *Précis de droit international privé*, 5th ed. p. 933.

⁵ See Planiol et Ripert (Esmein), *Traité pratique de droit civil français* (1931), vii, p. 65 (no. 767). As to German law see the judgment of the German Supreme Court of (at p. 174) 5. 7. 1910 in *Reichsgerichtsentscheidungen* (RGZ), vol. 77, p. 171.

⁶ See Weiss, *op. cit.* iii, p. 190, note; Lainé in *Bulletin de la Société de Législation comparée*, 1889-90, vol. xix, p. 554.

⁷ *Internationalprivatrecht* (in *Stammler: Das gesamte Deutsche Recht*) at p. 1624.

⁸ *Internationales Privatrecht*, p. 104—5.

case of enrichment flows from some previous transaction, *e.g.* a donation or the acquisition of a right of property by prescription. According to them each case of enrichment has its proper law which it derives from the previous transaction. It seems to follow from this that in the majority of cases the proper law is the *lex rei sitae* in the case of land or chattels and the *lex loci actus* in other cases. This solution certainly seems to demand serious attention where the *locus* of the transaction resulting in enrichment can be ascertained without difficulty.

Where there has been what an English lawyer would term a failure of consideration or where performance of a contract is frustrated there is a body of opinion on the Continent which advocates that any questions of enrichment which arise should be determined in all cases in accordance with the law of the original contract.⁹ This solution comes dangerously near to the doctrine of Laurent which has already been referred to and is otherwise open to criticism. Even if the proper law is the correct test of the existence or non-existence of a contract it appears to be illogical to extend this test to the *sequelae* of the contract when the proper law of the contract results in a finding that the contract has ceased to exist.¹⁰

The majority of Continental writers favour the *lex loci actus* (the *locus* being unspecified), whether the enrichment is connected or not with a pre-existing contract which has been determined. This principle is supported by a body of opinion which is almost overwhelming in character.¹¹ It is adopted as a test by codified law in many instances¹² and is also given effect to by judicial practice in many countries.¹³ Whether this, notwithstanding its widespread recognition, is the correct principle to apply to conflicts in the case of quasi-contract is a matter which will be discussed hereafter.

Other tests which have been suggested are those of the personal law of the parties based either on nationality or domicile. The nationality of the parties is adopted by Zitel-

⁹ Arminjon, *Précis de droit international privé*, 2nd ed. ii, p. 339. This view is also supported by two recent decisions of the German Supreme Court of May 4, 1932, IPRspr. 1932, p. 86, no. 38, and May 15, 1930 IPRspr. 1930, p. 120, no. 50. See also the decision of the Supreme Court of the Netherlands quoted in the *Répertoire de droit international* (Pays Bas), vol. vi, no. 251.

¹⁰ Schnitzer, *Handbuch des Internationalen Privatrechts*, p. 290.

¹¹ The majority of French, Swiss and Dutch writers favour this view. Opinion is divided in Germany.

¹² For the relevant statute law see Ficker in *Rechtsvergleichendes Handwörterbuch*, vol. iv (sub tit. Quasikontrakte) p. 387.

¹³ See the articles in *Répertoire de droit international*, vols. vi and vii, under the heading of Belgium, Bulgaria, Italy, The Netherlands and Switzerland. In Germany the practice varies.

mann¹⁴ as a general principle and, as a preliminary rule of factual connexion (*Anknüpfung*), by Frankenstein.¹⁵ It is also sponsored by Rolin¹⁶ and Pouillet¹⁷ where the parties are of the same nationality. The domicile of the person enriched is the test preferred by Walker¹⁸ and it has also been accepted by the Austrian¹⁹ and the Czecho-Slovak Courts.²⁰ Von Bar²¹ also advocates the law of the domicile, though he does not make it clear whether he means the domicile of the person enriched or the person impoverished. Arminjon²² accepts the test of domicile if it is common to both parties.

The *lex loci solutionis* has been adopted by the German Courts.²³ It is submitted that this was done partly because the *lex loci solutionis* is a very convenient supplementary test in cases of debts of any kind and partly because it coincides, as a rule, with the law of the debtor's residence.

There remains the test of the *lex fori* which was adopted by the Anglo-German Mixed Arbitral Tribunal in a case presenting the same problem as *Chandler v. Webster*.²⁴ The Tribunal rejected the test of the *lex loci actus* and applied the principle of unjustifiable enrichment as embodied in Scots and German law. This conclusion was arrived at by treating the principle of unjustifiable enrichment as a matter of international public policy (*ordre public externe*) and applying it in this way as the *lex fori* of the Tribunal.²⁵ Of writers on private international law Valéry²⁶ and perhaps Pillet-Niboyet²⁷ support the application of the *lex fori* on grounds of national public policy (*ordre public interne*) and the only French decision in point seems to favour this solution.²⁸

The position in Continental law may perhaps be summarized in this way. In spite of the general acceptance of the principle

¹⁴ Internationales Privatrecht, ii, p. 523, cited by Frankenstein, ii, p. 391, note 29.

¹⁵ Internationales Privatrecht, ii, pp. 392, 393.

¹⁶ Principes de droit international privé, vol. i, p. 568.

¹⁷ Manuel de droit international privé belge, 2nd ed. p. 395.

¹⁸ Internationales Privatrecht, 2nd ed. p. 467.

¹⁹ Répertoire de droit international (Autriche), vol. vi, no. 178.

²⁰ *Ibid.* (Tchécoslovaquie), vol. viii, no. 184.

²¹ Theorie und Praxis des Internationalen Privatrechts, 2nd ed., vol. ii, pp. 123, 124, 113.

²² *Op. cit.*, p. 339.

²³ Supreme Court of July 5, 1910, RGZ, vol. 77, p. 171; see also of March 16, 1928, IPRspr. 1928, p. 37, no. 58.

²⁴ [1904] 1 K. B. 493.

²⁵ Décisions des Tribunaux Arbitraux Mixtes, vi, pp. 13, 588, 607, 639.

²⁶ Manuel de droit international privé, p. 970.

²⁷ *Op. cit.* p. 610.

²⁸ Cass. civ. 23. 2. 1891, D. 1892. 1. 29; S. 1895. 1. 78 and the decision of the Court of Appeal of Athens cited in Clunet, vol. 34 (1907), p. 503.

of unjustifiable enrichment as based on natural justice, conflicts occur and there is no certainty or uniformity in the solutions which have been arrived at. From the standpoint of the English system of private international law these solutions are very useful in so far as they furnish a background against which the difficulties of the problem stand in relief. But their value as a guide to the principles which should prevail is more doubtful.

CONCLUSIONS.¹

In view of the absence of authority an English judge who is called upon to adjudicate in a dispute of a quasi-contractual nature, which contains a foreign element, has, it is submitted, a free hand as regards choice of law. He has it in his power to select one or other of the following tests:—

- (A) The domicile either (i) of the party who is impoverished, or (ii) of the party who has been enriched.
- (B) The *lex loci actus*, *i.e.*, either (i) the law of the place in which the unjustifiable enrichment occurs, or (ii) the law of the place in which the transaction takes place which subsequently results in the enrichment.
- (C) The proper law of the quasi-contractual obligation ascertained by means of the presumed intention of the parties and by way of analogy to the case of a contract.
- (D) The *lex fori*, *i.e.*, English law.

Which of these solutions is to be preferred is a question of some considerable difficulty, and the submissions which follow are made with great diffidence. The difficulty is enhanced by the fact that the principle on which relief in quasi-contract is based in English law must be regarded as uncertain until the House of Lords has pronounced on the matter. If the views held by Lord Wright and Professor Winfield are accepted an element will disappear which may possibly give rise to difficulties of classification, *i.e.*, the antithesis between quasi-contract founded on the principle of *ex aequo et bono* and a right dependent on the possibility of implying a contract to pay for a benefit or to restore an unjustifiable enrichment. But subject to this

¹ No reference is made to the *lex patriae* because it appears to be inappropriate to the decision of conflicts submitted to an English Court except in so far as it might possibly be introduced into the matter by the operation of the doctrine of renvoi. Lack of space has precluded us from dealing with the subsidiary problems of classification or renvoi which may arise. Our concern has been to present the problem in its broad outlines.

an examination of the solutions outlined above appears to lead to the following conclusions.

The Law of the Domicil.

This seems to be inappropriate. Suppose that A, a domiciled Frenchman, enters into a contract with B, a domiciled Englishman, for the hire of a seat from which to view a coronation procession in London. A pays 500 francs in advance to B in Paris, but the procession is subsequently abandoned. To apply either French law (the law of A's domicil) or English law (the law of B's domicil) would seem to be arbitrary, for why should either domicil be preferred to the other? Moreover, it is conceivable in cases of this kind that A might be unaware of the exact domicil of B or *vice versa* or that the parties would, in the present state of the law, have to take counsel's opinion before they could in any way be sure of their ground.

The Lex Loci Actus.

This test, which seems to offer the best solution from a practical point of view is nevertheless open to criticism. To begin with what do we mean by the *locus*? Is it the place of enrichment or the place of impoverishment or the place in which the transaction occurs which results in an enrichment? There seems to be little doubt that the *locus* is the place in which the payment of money or transfer of property occurs which constitutes the unjustifiable enrichment. This is the solution which has been adopted by the American Restatement,² and, in substance, it also appears to cover most of the cases envisaged by Wolff and Gutzwiller.³ The application of this test may, however, lead to a result which is not easily reconcilable with the principle of *ex aequo et bono*. Neuner⁴ instances the case in which there is a contract made between a domiciled German and a domiciled Englishman which is frustrated. Subsequently a claim is made by the German for the restitution of an advance payment under the contract. Here the law of the place in which payment is made may be of paramount importance. If the German has paid in England he cannot recover owing to the operation of the rule in *Chandler v. Webster*.⁵ If he is careful to pay in Germany or in France he will be able to recover by

² § 453.

³ *Ante*, p. 85.

⁴ *Zeitschrift fuer auslaendisches und internationales Privatrecht* (1928), vol. ii, p. 122, note 1.

⁵ *Ubi supra*.

virtue of Art. 812 of the German Civil Code and Arts. 1183-4 of the French Code Civil.⁶ Nevertheless, it would seem that the law of the place in which the money is paid or in which the property becomes vested in the person who is enriched will in the great majority of instances be the law which has the closest connexion with the enrichment. It operates independently of the nationality or domicile of the parties. It avoids the employment of a cumulation of legal fictions and does not lend itself, save in exceptional cases, to attempts to turn a rule of conflict to the profit of one or other of the parties. It meets the cases of restitution *ex aequo et bono* and also the cases in which a contract to restore is implied by law. These are extremely cogent reasons for its adoption.

The Proper Law.

The test based on the presumed or objective intention of the parties—for such it must necessarily be—is in this instance highly artificial in character. It involves a cumulation of fictions: the first fiction being the assimilation of quasi-contract in the strict sense, and the second fiction being the presumption of an intention that restitution should take place. This would in some cases involve a distortion of the attitude which the parties would have adopted if they had thought about the matter. If we may revert to the last illustration given, the German, having in mind his own law, would have thought that he was entitled to restitution whilst the Englishman would consider that he was entitled to retain the advance payment. An attempt to presume a common intention in these circumstances is to work the theory of a proper law to death. It may be added that if English law should adopt the principle that quasi-contractual rights arise *ex aequo et bono* the search for a fictitious intention would be otiose. Such intention would be irrelevant because restitution would rest on an overriding principle of law and not on any legal fiction.

Where the enrichment springs from a previous contract, the solution which would apply the law of the original contract is attractive, but it might lead to an impasse. Certain systems of law, *e.g.*, French law, regard frustration as avoiding a contract *ab initio*. If the proper law of the contract in such a case is held to be French law there is *ex hypothesi* no contract and an English Court would have to seek for some other solution.

⁶ See Cass. civ. 4. 5. 1898; D. 1898. i. 457.

The Lex Fori.

This test has few supporters. Its champions on the Continent base their opinion on municipal public order (*ordre publique interne*) by which is meant the principle that it is contrary to the policy of any system of law to permit a man to retain that which he receives by way of unjustifiable enrichment. This is also, when applied to the international sphere, the principle underlying the decision of the Anglo-German Mixed Arbitral Tribunal, to which reference has been made.⁷ But this solution is not a practical one so far as choice of law by an English Court is concerned, since it does not base the right to recover on public policy. Moreover, the test of the *lex fori* is open to serious objection on other grounds. It would lead to a manoeuvring for position by the parties which should be avoided whenever possible in matters of conflict. The facts in *Chandler v. Webster*⁸ furnish a case in point. If the plaintiff and the defendant in that case had been resident in different jurisdictions we might well have witnessed a scramble, wholly incompatible with the dignity of the law, by each party to commence proceedings in that country whose law was most favourable to him. The adoption of the *lex fori* as a test would also serve as an encouragement to the type of recalcitrant debtor who has carried to a fine art the practice of evading those jurisdictions in which he might be held liable. On the other hand, the test possesses certain merits. It gives uniform treatment irrespective of the personal law of the parties or of any fortuitous elements which may be present in any particular case. It also relieves the trial judge of the unenviable task of probing into perplexing questions of foreign law.

The Remedy.

There still remains the thorny problem of the law which is to be applied in determining the quantification of the relief to be granted by an English Court in a case of unjustifiable enrichment which contains a foreign element. There is no direct authority in point, but the order made by the Court of Appeal in *Batthyany v. Walford*⁹ shows that the Court was of the opinion that the questions of *quantum* which arose fell to be determined by the law governing the quasi-contract. On principle it would seem that the extent of an obligation must

⁷ *Ubi supra.*

⁸ *Ubi supra.*

⁹ *Ubi supra.*

be fixed by the law from which the obligation takes its source.¹⁰ The quantification of the amount which is due by way of restitution from the person who is enriched is not a procedural matter as in the case of the assessment of damages. It is rather in the nature of a debt the amount of which must be ascertained by the law governing the obligation and not by the *lex fori*.¹¹

It is unlikely that the remedy given by the law of the obligation will be one unknown to our law, since relief must take the form of the restitution of property or the repayment of money. But where the remedy prescribed by the law of the obligation is the restitution of something other than money (*e.g.* the re-conveyance of an immovable or the delivery up of a chattel) it is more than doubtful if an English Court would apply the remedy. It would certainly not do so if the property is abroad and its decree would be entirely ineffectual. Moreover, until it is settled whether a claim for an unjustifiable enrichment rests upon a 'supereminent equity' or not¹² the elements which must be present before an English Court will order the restitution of property as being retained against conscience appear to be lacking. The matter is, however, one which cannot be pursued in this place.¹³

The Choice of Law.

The respective merits and demerits of the various solutions which have been proposed are somewhat evenly balanced, but it would seem that the law of the domicile and the law of the forum should be ruled out. The law of the domicile raises technical difficulties which, in our submission, are fatal to its adoption. The *lex fori* lends itself too readily to abuse to be regarded as a satisfactory test. If the 'proper law' of the obligation means the search for an objective intention, then, as we have endeavoured to show, it is inappropriate in the circumstances which lead to a claim for the restitution of an enrichment.

Our submission is that conflicts of law in matters of unjustifiable enrichment should be resolved in accordance with the law of the place in which the payment of money or the

¹⁰ Cheshire, *op. cit.* pp. 657, 658.

¹¹ Valéry, who favours the application of the *lex fori* to claims for restitution admits that the quantification of the sum to be restored must be governed by the law of the obligation.

¹² See *per* Lord Dunedin, *Cantiare San Rocco v. Clyde Shipbuilding and Engineering Co.* [1914] A. C. at p. 434.

¹³ See, generally, Dicey, *op. cit.* p. 207 *passim*; Cheshire, *op. cit.* p. 563 *passim*.

vesting of property occurs which constitutes the enrichment. This is the solution adopted by the American Restatement and we venture to think that it is supported both by theoretical considerations and by the fact that it seems to be the rule best calculated to do justice in the majority of cases which, after all, must be the chief aim of any system of the Conflict of Laws.

Finally, if we have laid ourselves open to the charge that we have made a mountain out of a molehill, may we plead in extenuation that the subject-matter is one which seemed to us to afford an unusual opportunity for the application of the comparative method to the conflict of laws owing to the absence of direct authority in any national system. We venture to express our belief that if private international law is to be rescued from the condition of malaise which affects it throughout the world at the present time the remedy must be sought in the comparative method of study. Otherwise its claim to be international in character can never be more than a fiction and we hope that this will be taken into consideration in mitigation of any sentence that may be pronounced.

THE SCIENCE OF COMPARATIVE LAW.

M. SCHMITTHOFF.

IN the course of the recent revival of the study of Comparative Law, repeated attempts have been made to define the nature and province of this branch of the law. Some writers maintain that Comparative Law represents a method of study rather than a department of legal science. They point to the fact that the technique of comparing different legal systems can be employed in almost every branch of the law and that Comparative Law, unlike the branches of positive law, does not fulfil a definite function in the life of society. In particular, writers on jurisprudence and history such as J. BRYCE,¹ HOLLAND² and Professor JENKS³ are inclined to subscribe to this view. Among the jurists who have made a special study of Comparative Law, Professor GUTTERIDGE and Professor KADEN are strongly in favour of this view. Professor GUTTERIDGE says: 'The comparative method lends itself to the study of any branch of legal learning.'⁴ According to Professor KADEN, it is the province of Comparative Law to disclose the points of agreement and difference in the solution which is provided by several legal systems for the same legal problem. The learned writer denies, however, that it is the function of Comparative Law to found a system of legal abstractions on the results of factual comparison.⁵ On the other hand, a number of students of Comparative Law consider their subject as a special branch of the science of law. Professor SALEILLES,⁶ Professor LAMBERT⁷ and Professor RABEL⁸ support this view. These writers attribute to Comparative Law a definite province similar to that occupied by other branches of positive law. They do not,

¹ J. Bryce, *Studies in History and Jurisprudence*, Oxford, 1901, vol. ii, 142 *seq.*

² Holland, *Jurisprudence*, 13th ed., 1924, 8.

³ E. Jenks, *The New Jurisprudence*, 59.

⁴ Professor H. C. Gutteridge, 'The Value of Comparative Law', in the *Journal of the Society of Public Teachers of Law*, 1931, 28.

⁵ Professor Erich-Hans Kaden, 'Rechtsvergleichung' in *Rechtsvergleichendes Handwoerterbuch*, ed. by Dr. F. Schlegelberger, Berlin, 1936, vol. 6, 11.

⁶ R. Saleilles, *Doc. I*, 168, 179.

⁷ E. Lambert, *La fonction du droit civil comparé*, 915.

⁸ E. Rabel, *Zeitschrift fuer Auslaendisches und Internationales Privatrecht*, 1927, n. 1.

however, agree in defining the scope of the province of Comparative Law. It seems to be a moot point whether Comparative Law is a method or a science. The answer depends entirely on the interpretation of the terms 'method' and 'science'. How vague and interchangeable these expressions are, so far as legal terminology is concerned, may be seen from the fact that there exists an essay entitled 'the methods of legal science',⁹ as well as a book styled 'the science of legal method'.¹⁰ It may well be left to philology to disentangle this problem.

Of higher practical value is the distinction between the activities concerned with the collation of facts and the utilization of the results gained by comparison. The first phase is mainly descriptive; it consists in examining the reaction of a number of legal systems to an individual legal problem. The second stage is concerned with the utilization of the results obtained in the first phase, and this utilization can be effected for a great variety of reasons. The distinction between the comparison and the subsequent utilization underlies the classification of Comparative Law by many writers. Thus, Professor LAMBERT contrasts the descriptive side of Comparative Law with 'comparative history' and 'comparative legislation'.¹¹ Whilst the separation of the descriptive from the utilizing sphere is essential for the definition of Comparative Law, it is too narrow to limit the utilizing phase to history and legislation. It will be seen that the utilization may serve other purposes, too. Professor WIGMORE defines 'the convenient but loose term Comparative Law' as follows: 'First we may seek to ascertain and *describe* the other systems as facts'—that he calls Comparative Nomoscopy. 'Secondly, we may seek to analyze the *politics* and relative *merits* of different legal institutions . . . with a view of moulding legislation'—that he calls Comparative Nomothetics; 'and thirdly, we may seek to trace the *evolution* of the various systems in their relation one to another in chronology and causes'—that he entitles Comparative Nomogenetics.¹² Here again, the essence of the classification is a separation of the descriptive from the utilizing side though Professor WIGMORE, like Professor LAMBERT, singles out some

⁹ By J. Bryce, *Studies in History and Jurisprudence*, Oxford, 1901, vol. ii, 142.

¹⁰ 'The Science of Legal Method', *Select Essays by Various Authors*, ed. by the Association of American Law Schools, New York, 1921.

¹¹ E. Lambert, in *Encyclopaedia of the Social Sciences*, the Macmillan Company, 1931, vol. iv, 127.

¹² J. H. Wigmore, *A Panorama of the World's Legal Systems*, Saint Paul, vol. iii, 1120.

of the special functions of the second phase without taking into account the complete range of aims which may be pursued by comparative legal research. Professor RABEL draws a distinction between the pure comparison of law (*'Reine Rechtsvergleichung'*) and the subsequent utilization of the results. He calls the second phase *'die Wertung'*, a conception which is sufficiently neutral and colourless to embrace the various aims which may be pursued by a comparative study of law. Here we have the broad and fundamental distinction between the two phases of Comparative Law, namely, the pure comparison and the subsequent utilization of the results, no matter what ends are pursued by the utilization.

I.

THE COMPARISON.

The process of comparison involves the existence of the following prerequisites: First, the topic or topics under examination must be comparable, secondly, regard must be had to their legal and social background, and thirdly, an analytical classification of an impartial and purely scientific character must be applied to the matters under investigation.

(1) The modern school of Comparative Law which Professor JENKS has called 'the stricter method' of Comparative Law attaches great weight to the factor of comparability.

(a) The subject of comparison is always an individual legal problem. The unity of the problem is an essential feature of legal research extending over several territorial systems. The question is always how several legal systems react to the same legal problem. A German jurist says: 'The fact that the problem is one and the same warrants the comparability.'¹³ The problem under examination may be wide, it may extend to the nature of the legal system as such, as in Professor WIGMORE's monumental work entitled 'A Panorama of the World's Legal Systems', or it may be confined to a single legal institution as in the case of Professor GUTTERIDGE's examination of the 'Abuse of Rights'.¹⁴ It is invariably the unity of the problem which warrants the possibility of comparison.

(b) The strict observance of comparability implies further that the comparison must extend to the same evolutionary stage of the different legal systems which are under comparison. SIR FREDERICK POLLOCK has strongly maintained this point.

¹³ Max Salomon, *Grundlegung zur Rechtsphilosophie*, 2nd ed. 1925, p. 30.

¹⁴ 5 Cambridge Law Journal, 22.

He says: 'To compare the institutions of Indian law and custom directly with modern English law can lead to nothing but ludicrous if not dangerous misunderstandings; as indeed happened in at least one celebrated example.'¹⁵ Similar views are expressed by Professor LEE¹⁶ and M. ESCARRA.¹⁷

(c) With regard to the number of legal systems compared, there must be two territorial systems at least, otherwise a comparative study of law would not be feasible. However, if the plurality of territorial systems is given, it is not relevant whether the examination extends to a greater or smaller variety of legal systems. Professor KADEN observes rightly: 'For the conception of Comparative Law it is of no influence whether the number of legal systems compared is greater or smaller though it is desirable that as many legal systems as possible should be compared because this increases the reliability of the result.'¹⁸

(2) The second factor which has to be taken into account on the factual side of a comparative study of law is the connexion of the legal problem at issue with the general background of the law.

We are to-day accustomed to consider law as a sociological phenomenon which cannot be separated from the other components of the structure of modern society. In consequence, every comparative study of law which claims to deserve the name has to consider its subject-matter both as a product and as a cause of those general sociological tendencies. The importance of this approach can hardly be exaggerated. So far as comparative legal research is concerned, the position of the institution under examination may be affected by the peculiar place which it has acquired in the legal system of which it forms part, and, further, some sociological incidents beyond the sphere of law may lend a peculiar colour to the institution.

First, the quality of a legal institution may differ according to the structure of the legal system of which it forms part. The same institution may hold a key position in the legal

¹⁵ Sir Frederick Pollock, 'The History of Comparative Jurisprudence', in *Journal of the Society of Comparative Legislation* (N. S.), vol. v (1903), 1905, 76.

¹⁶ R. W. Lee, in 'Comparative Law and Comparative Lawyers' in the *Journal of the Society of Public Teachers of Law*, 1936, 3: 'The nearer the resemblance between the two systems to be compared the more profitable will be the comparison.'

¹⁷ G. Escarra, 'The Aims of Comparative Law', 7 *Temple L. Q.* 309: 'It is perfectly useless, for instance, to look for points of comparison between the institutions of original Chinese law, that is of the ancient law dating back a great many centuries, and the contemporary institutions taken from another nation.'

¹⁸ Professor Kaden, *op. cit.* 10—11.

system of one country and may be of subordinate character in another system where the corresponding social needs are satisfied by other legal institutions. It would not be fair to compare the English institution of the will with the French *testament*¹⁹ without taking into account the effect which the English settlement produces after the death of the settlor. Again, we cannot compare properly the German '*Patent*' with the English '*Letters Patent*' without taking into account the German institution of the '*Gebrauchsmuster*' (utility model) which covers many cases that under the English system would be protected by letters patent.²⁰ This implies that a comparative study of law—though concerned with a limited problem—must take into account the totality or, to use Professor LEE's words, the physiognomy of the legal systems to which the research extends. The gravity of the task is enhanced by the dynamic nature of law.²¹ The practitioner administering an individual legal system will usually be conscious of the changes in the substance of the law which are hardly perceptible from without, for law on the institutional side is reluctant to adjust the traditional forms to the changes in substance. The student of Comparative Law, because of the dynamic nature of law, has to keep under constant observation the foreign legal system to which he has devoted his special attention. This explains the modern tendency to consider the professional study of Comparative Law as particularly suitable for team work.²² The Institutes of Comparative Law at Paris,²³ Lyons,²⁴ Brussels,²⁵ Berlin,²⁶ Rome,²⁷ Madrid,²⁸ and the research centre at Tulane University (Louisiana) bear witness to this development. No organized research centre of Comparative Law exists as yet in Great Britain, nor apparently anywhere else in the British Empire.

¹⁹ Code Civil, Art. 967 *seq.*

²⁰ Compare St. P. Ladas, *the International Protection of Industrial Property* (Harvard Studies in International Law, vol. ii, Cambridge, Mass. 456) (Japan and Poland have followed the German example).

²¹ Lord Tomlin in *Pearl Assurance Co. Ltd. v. Government of the Union of South Africa* (50 T. L. R. 564) observes with regard to the Roman-Dutch law: 'That law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organized society.'

²² S. G. Vesey-FitzGerald in *Journal of the Society of Public Teachers of Law*, 1931, 32.

²³ Institut de Droit Comparé (Professor H. Lévy-Ullmann).

²⁴ Institut de Droit Comparé (Professor E. Lambert).

²⁵ Institut de Droit Comparé.

²⁶ Institut fuer Auslaendisches und Internationales Privatrecht (Professor E. Rabel).

²⁷ Institut International pour l'Unification du Droit Privé (under the direction of the League of Nations); Istituto di Studi Legislativi (Professor Galgano).

²⁸ Instituto Ibero-Americano de Derecho Comparado (Professor Altamira).

Secondly, sociological influences of a non-legal character, such as history, economics, ideology, may lend a particular colour to the problem under examination. The authorities concur in attributing great weight to this factor. SIR FREDERICK POLLOCK observes: 'The working life of any body of law depends not merely on its authentic texts and the decisions or books that interpret them, but on complex influences of professional training, tradition, and habit of mind,'²⁹ and he continues that particular importance has to be attached to the 'proper historical atmosphere'. M. ESCARRA refers to the 'untold research into the philosophical, social, political and economic motives' which are necessary to carry out a comparative legal study.³⁰

(3) The third problem connected with the descriptive phase of a comparative legal study is the question how far critical analysis should be applied at this stage. Even the pure description of facts cannot, it is believed, achieve a scientific standing without methodical classification. Without such analysis, the accumulation of facts would be inaccessible and devoid of interpretation. This analysis should, however, be effected *sine ira et studio*, like the summing-up of a judge to the jury. It must be left to the tact and experience of the student in charge of the factual research to summarize the results in an accurate and fair manner and not to transgress in the sphere of the '*Wertung*'. The work done in the great continental Institutes of Comparative Law shows that here again the team work principle provides the best solution.

II.

THE UTILIZATION.

No lawyer would embark on a comparative legal study without intending that his endeavours should be utilized either by him or by others. Even the great encyclopaedias of Comparative Law pursue such purposes, as may be seen from SIR THOMAS SCRUTTON's preface to 'The Commercial Laws of the World',³¹ or from the introduction of the editors to collections such as '*Die Zivilgesetze der Gegenwart*',³² '*Rechtsvergleichendes Handwoerterbuch fuer das Zivil-und*

²⁹ Sir Frederick Pollock, *op. cit.* 77.

³⁰ J. Escarra, *op. cit.* 304

³¹ The Commercial Laws of the World, London, vol. i, at p. vii.

³² *Die Zivilgesetze der Gegenwart*, originated by Karl Heinsheimer, Mannheim.

Handelsrecht',³³ or '*Rechtsverfolgung im Internationalem Verkehr*'.³⁴

The results gained in the descriptive phase may be utilized in different ways. They may be employed with the view of enlarging the general knowledge of the law; these departments of Comparative Law pertain to Jurisprudence or History. The results of comparative legal research may further be utilized in a positive manner; Applied Comparative Law in this sense fulfils definite social functions which do not differ, in principle, from other branches of positive law. The ultimate aims of Applied Comparative Law are either the improvement of one's own legal system or the avoidance of a conflict of territorial systems. Under the first group falls the utilization of Comparative Law in aid of the law reformer and as guide for the Court. The second group comprises the efforts of the international jurisconsult and, more generally, the organized attempts to arrive at a co-ordination and unification of the laws of the universe.

(1) *Utilization for the Improvement of the General Knowledge of the Law.*

(a) So far as *jurisprudence* is concerned, the traditional view is that the comparative approach is one of the methods available for the definition of the law. BRYCE represents this view³⁵; he mentions four methods which are employed by jurisprudence, namely the metaphysical or *a priori* method, the analytical method, the historical method, and the comparative method. BRYCE examines the advantages and disadvantages of every one of these methods and assigns to each its proper domain. His main objection to the comparative method is that the material is too scanty for the purposes of a philosophy of law in general, an objection which has been largely met by the legal research undertaken since 1901 when BRYCE's essay was published. Professor JENKS, in his '*New Jurisprudence*' refers to three methods of juridical approach, namely the analytical, the historical and the comparative method.³⁶ The Professor mentions the revival of the comparative method after the War, notes the greater strictness of the modern school of comparative lawyers, and considers this method to be an important instru-

³³ *Rechtsvergleichendes Handwoerterbuch*, ed. by Franz Schlegelberger, Berlin.

³⁴ *Rechtsverfolgung im Internationalen Verkehr*, ed. by Leske-Loewenfeld, Berlin.

³⁵ J. Bryce, '*Methods of Legal Science*', in *Studies in History and Jurisprudence*, vol. ii, Oxford, 1901, 174.

³⁶ Professor Edward Jenks, in *The New Jurisprudence*, 26.

ment for the promotion of a 'better understanding between the influential and active spirits of different nations' as well as for the unification of the commercial laws of the world.³⁷

Two modern schools of jurisprudence have increasingly attracted contemporary thought. The first is the sociological school, as particularly represented by the teaching of Dean ROSCOE POUND; the other is the psychological doctrine which has found its outstanding formulation by the Italian Professor DEL VECCHIO.³⁸ Both doctrines reserve an eminent place to the science of Comparative Law. As regards the sociological school, Professor LAMBERT observes that it forms '*le cadre et la partie descriptive de la sociologie juridique*'.³⁹ M. LEPAULLE, after offering some criticism to Dean POUND's interpretation of the sociological doctrine, says 'that the aim of legal sociology gives to Comparative Law a very important function'. He refers particularly to the necessity of a '*recoupment*', i.e. a verification of a scientific hypothesis by practical experiments effected from different points of view.⁴⁰ The psychological school, on the other hand, has provided an entirely new ideological background to Comparative Law. The doctrine of Professor DEL VECCHIO, who has been influenced by the German jurist VON FEUERBACH, has been summarized by M. ESCARRA in such perfect form that one may be permitted to repeat his statement: 'Every man bears in himself the principle of law; every conscience possesses the elements enabling it to rise above its own empiric personality and to fit itself into an order with others. . . . This unity of human spirit from which law rises is apparent in the continuity and the universality of law. A series of identities and resemblances which are to be found in the positive law of all nations is another confirmation of this.'⁴¹ No greater contrast is possible than between this school of jurisprudence and the historians who, like VON SAVIGNY, teach that law like language is peculiar to every nation. The jurisprudence of DEL VECCHIO provides, as M. ESCARRA rightly maintains, the juristic theory for an age which considers Applied Comparative Law as an integral part of the attempts to achieve the final pacification of the world.

(b) In the sphere of *legal history*, Comparative Law has secured a clearly defined position. Comparative Law has here

³⁷ Professor Edward Jenks, *op. cit.* 64—65.

³⁸ Giorgio del Vecchio, *L'idée d'une science du droit universel comparé*.

³⁹ E. Lambert, *op. cit.* 915.

⁴⁰ Pierre Lepaulle, The Function of Comparative Law, with a Critique of the Sociological Jurisprudence, in 35 *Harvard Law Review*, 852.

⁴¹ J. Escarra, *op. cit.* 307—308.

developed the ethnological school, a term which appears too narrow to express the wide aims of this school. This branch of Comparative Law is concerned with an examination of the general development of the law during the different evolutionary phases of mankind. It pays special attention to the growth of the legal systems as entities. Its particular aim is to shed light on the emergence of social order and law in primitive society by comparing the legal sources which have come down to us from early ages with the ancient European or the modern eastern systems which represent similar stages of the social evolution.⁴² The general tendencies of this school are explained by SIR FREDERICK POLLOCK when analyzing the teaching of SIR HENRY MAINE: 'He showed, on the one hand, that legal ideas and institutions have a real course of development as much as the *genera* and *species* of living creatures, and in every stage of that development have their normal character; on the other hand, he made it clear that these processes deserve and require distinct study, and cannot be treated as mere incidents in the general history of the societies where they occur.'⁴³ SIR HENRY MAINE'S 'Ancient Law' is the outstanding product of this school in Anglo-Saxon Law. Reference should, further, be made to Professor WIGMORE'S work entitled 'A Panorama of the World's Legal Systems'.⁴⁴ The Professor describes sixteen legal systems, ancient and modern, and draws from his narrative a number of valuable conclusions. Dr. DIAMOND, in his 'Primitive Law',⁴⁵ has reviewed the field in the light of the evidence which has been produced by modern research.

(2) *Applied Comparative Law.*

Applied Comparative Law has always been considered the most important aspect of Comparative Law. It is doubtless the most ancient one. For practical purposes, the Romans deliberately imitated many of the Greek legal institutions⁴⁶; for the improvement of English law, BRACON looked at the Roman system⁴⁷; in deference to the solidity of English law, FORTESCUE wrote his '*De Laudibus Legum Angliae*'; with a view to acting as an intermediary between the Common Law

⁴² Kaden, *op. cit.* 14.

⁴³ Sir Frederick Pollock, in the introduction to Sir Henry Maine, 'Ancient Law', at p. xvi (John Murray, London).

⁴⁴ (3 volumes), 1928, Saint Paul, West Publishing Co.

⁴⁵ A. S. Diamond, *Primitive Law*, 1935.

⁴⁶ Compare Walter Hug, *The History of Comparative Law*, XLV *Harvard Law Review*, 1030.

⁴⁷ Professor Theodore F. T. Plucknett, *A Concise History of the Common Law*, 2nd ed. 233.

and the Civil Law, ST. GERMAIN published the dialogues between the 'Doctor and Student'. The revival of Comparative Law after the War also served practical ends. It was caused by the longing for permanent peace which prevailed among the peoples concerned after the great tragedy. This tendency found its expression not only on the institutional side, by the creation of the League of Nations, but also in the organized attempts to co-ordinate and unify the private law of the nations. The parallelism of the reorganization of the international society and the revival of Comparative Law found their visible expression in the constitution of the International Institute for the Unification of Private Law in Rome which works under the direction of the League of Nations.⁴⁸

(a) *Comparative Law and the Improvement of One's Own Legal System.*—In the pre-War period, the practical aims pursued by Comparative legal research were less ambitious. They are disclosed in the names of the '*Société Française de Législation comparée*' (1869) and the English '*Society of Comparative Legislation*' (1895). With regard to the latter, Mr. H. J. RANDALL observes: 'The rather strange name was undoubtedly a diplomatic subterfuge. It would have been a hopeless task to have aroused interest in a society formed to study anything so unpractical and academic as Comparative Law; but comparative legislation had a useful and practical sound about it.'⁴⁹ Professor HUG explains that in the first half of the nineteenth century there was general agreement that the value of comparative legal studies consisted entirely in suggesting improvements in municipal law.⁵⁰ Applied Comparative Law, as directed to the improvement of the municipal legal system, assumes two forms, namely the aid offered to the legislator and that offered to the judge.

(i) The value of Comparative Law as an *aid to the legislator* is generally recognized. SIR HENRY MAINE says that this is 'if not the only function, the chief function of Comparative Jurisprudence'.⁵¹ Professor GUTTERIDGE notes its utility for

⁴⁸ Compare Resolution of the Assembly of the League of Nations, of September 30, 1924 (Resolutions and Recommendations of the League of Nations, 1924, at p. 18), and Statutes of the Institute, approved by the Council on March 15, 1926, Art. 2 (League of Nations Official Journal, VII (1926), at p. 579 (C. 156 (2), 1926, V)).

⁴⁹ H. J. Randall, in 'Sir John Macdonell and the Study of Comparative Law', in *Journal of Comparative Legislation and International Law*, Third Series, vol. xii, 1930, 189—190.

⁵⁰ Walter Hug, *op. cit.* 1069.

⁵¹ Sir Henry Maine, in *Village-Communities in the East and West*, London, John Murray, 1871, 4.

the law reformer.⁵² Professor ALVAREZ refers to the view that this branch of Comparative Law 'is indispensable in the preparation of internal legislation'.⁵³ M. ESCARRA mentions the French practice, which originated after the foundation of the French Society for Comparative Legislation, of submitting with bills introduced to the French Parliament surveys of the legislation of other countries on the same subject.⁵⁴

(ii) In the English Courts, comparative legal references are found in intricate cases where the English authorities are too scanty to offer guidance, or in cases concerning transactions of an essentially international character.

Under the second group fall cases like the interpretation of the gold clause in international loans.⁵⁵ LORD WRIGHT observes in *International Trustee v. The King*: 'The gold clauses in bonds and obligations are very common in international contracts and in every part of the world. It would be a very serious matter if contracts of that character were treated by particular Courts as having a different meaning, in the absence of language and surrounding circumstances of decisive character compelling that conclusion. The construction of such commercial clauses ought to be as far as possible uniform unless there are the strongest considerations involving a different construction.'⁵⁶ LORD RUSSELL, in the same case, expressed a similar view.⁵⁷

In intricate cases, the English authorities are occasionally too scanty to afford guidance to the Court. Here foreign authorities have been quoted as an aid both for argument and decision. The observations of TINDAL, C.J., in *Acton v. Blundell*,⁵⁸ of BLACKBURN, J., in *Taylor v. Caldwell*⁵⁹ and of LORD STERNDAL in *Manton v. Brocklebank*⁶⁰ give some indication how far the use of foreign authorities is admissible in an English Court. *Acton v. Blundell*⁵⁸ was concerned with a difficult question of land law, namely with the rights of a landowner whose well had been exhausted by a neighbour

⁵² H. C. Gutteridge, *op. cit.* 28.

⁵³ Alexandre Alvarez, 'Methods for Scientific Codification', in *Science of Legal Method*, 453.

⁵⁴ J. Escarra, *op. cit.* 300.

⁵⁵ M. Schmitthoff, in 'The Gold Clause in International Loans' in *The Journal of Comparative Legislation and International Law*, 3rd series, vol. xviii, 1936, at p. 266.

⁵⁶ [1936] 3 All E. R. 426.

⁵⁷ [1937] A. C. 500, 556; see also B. A. Wortley, 'The Gold Clause' in *British Yearbook of International Law*, 1936, p. 112.

⁵⁸ (1843) 12 M. & W. 324, 353.

⁵⁹ (1863) 32 L. J. Q. B. 164, at p. 166.

⁶⁰ [1923] 2 K. B. 218—219.

carrying on mining operations on his land. Counsel on both sides referred to the Civil Law. TINDAL, C.J., who based the judgment in favour of the defendant on the Digest, observed: 'The Roman law forms no rule, binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collected wisdom of ages and the groundwork of the municipal law of most of the countries in Europe.' A similar view was expressed by BLACKBURN, J., in *Taylor v. Caldwell*.⁶¹ After having referred to the Digest and to POTHIER's '*Traité des Obligations*', he observed: 'Though the Civil Law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded.' The limitations upon reference to foreign authorities are indicated by LORD STERNDAL in *Manton v. Brocklebank*,⁶² who commented on the fashion of bygone days to quote from venerable sources, and stressed the importance of limiting references to foreign authorities to those which are relevant. From the observations of TINDAL, C.J., BLACKBURN, J., and LORD STERNDAL it would appear that, in an English Court, the reference to foreign authorities is admissible if it is relevant, if a decision 'on principle' is involved and if no English authorities are available. It is not easy to see what TINDAL, C.J., and BLACKBURN, J., meant by saying that a decision 'upon principle' must be involved. It is submitted that this does not imply that the issue must be of a general nature. It means apparently merely that the problem must have arisen in other jurisdictions as well. This interpretation would be in accordance with the fact that foreign authorities have occasionally been invoked in cases of a technical character, such as *Acton v. Blundell*⁶³ and *Dalton v. Angus*.⁶⁴ Naturally, a foreign authority even of the highest character has merely persuasive authority in the English Courts.⁶⁵

The observations of TINDAL, C.J., and BLACKBURN, J., are

⁶¹ (1863) 32 L. J. Q. B. 164, at p. 166.

⁶² [1923] 2 K. B. 218—219.

⁶³ (1843) 12 M. & W. 324.

⁶⁴ (1881) 6 App. Cas. 740.

⁶⁵ See Lord Russell in *Feist v. Société Intercommunale Belge d'Electricité* [1934] A. C. 161. Lord Russell refers here to the Judgment of the Permanent Court of International Justice at The Hague in the case concerning the Serbian Loans, and he says here: 'I do not, I need hardly say, treat these as in any way binding upon us.'

remarkable in another direction. These judges considered Roman Law as the foreign system to which resort could be had as a general guide whenever the English Court thought it expedient to test the rules of the Common Law on a foreign legal system. Though the judges of the nineteenth century did not exalt the Roman law to such heights as some of their predecessors, they still adhered to the view that the Roman system served as a general guide whenever the Court required such means of judicial interpretation.⁶⁶

The position of Roman Law as a testing device for the rules of the Common Law has substantially changed during the last four decades. The reason is not so much that the systematization of English Law has been greatly advanced. The decisive cause is that the Anglo-Saxon legal system has acquired a world-wide character which competes internationally with the law of Rome. This extraordinary phenomenon has been visualized by BRYCE: 'The world is, or will shortly be, practically divided between two sets of legal conceptions or rules, and two only. . . . At this moment (1901), the law whose foundations were laid in the Roman Forum commands a wider area of the earth's surface, and determines the relations of a larger mass of mankind. But that which looks back to Westminster Hall sees its subjects increase more rapidly, through the growth of the United States and the British Colonies, and has a prospect of ultimately overspreading India also.'⁶⁷ It is only natural that the Anglo-Saxon system in the wider meaning should take the place of Roman Law as a general guide to the English Courts whenever they desire such guidance, and that to-day English judges should refer to American and Colonial cases as their predecessors resorted to the *Corpus Iuris*.⁶⁸ Dean POUND has explained that the unity of law among the English-speaking peoples throughout the world has its ultimate cause in the similarity of the legal technique which differs considerably from that employed by lawyers trained in a Roman legal system.⁶⁹ Thus, in *Beresford v. Royal Insurance Co., Ltd.*, LORD WRIGHT⁷⁰ when referring to some decisions of the Supreme Court of the United States points to

⁶⁶ The modern cases where the *corpus iuris* has been referred to, are collected and considered by David T. Oliver in 'Roman Law in Modern Cases in English Courts', in *Cambridge Legal Essays*, Cambridge, 1936, 91.

⁶⁷ J. Bryce, in 'The Extension of Roman and English Law throughout the World', in *Select Essays in Anglo-American Legal History*, vol. i, 619-620.

⁶⁸ See P. A. Landon in 52 L. Q. R. 170.

⁶⁹ R. Pound, *Introduction to Winfield, Chief Sources of English Legal History*, xiii-xiv.

⁷⁰ [1937] 2 K. B. 197, 216.

the view 'that it is desirable to have uniformity in the law of contracts as far as possible in our two countries' (*i.e.* in the United States and in England). Professor KEITH expresses the hope that the appearance of such an authoritative work as the American Restatement will direct the attention of the English Courts to the American precedents even more than is the case at present.⁷¹ American authorities have been quoted by the English Courts in such leading cases as the *Snail Case*⁷² and *Re Annesley*.⁷³

(b) *Comparative Law and the Avoidance of a Conflict of Laws*.—The second department of Applied Comparative Law is concerned with the co-ordination of different legal systems. The aims of this branch of the utilizing phase are to avoid a conflict of territorial legal systems.

This is the stage at which to attempt an alignment between the Conflict of Laws and Applied Comparative Law. Both are concerned with law 'in space'. With regard to Comparative Law, BRYCE has employed this phrase⁷⁴; with regard to the Conflict of Laws, the metaphor has acquired prominence because Professor BEALE has included it in his definition.⁷⁵ Whilst, however, the Conflict of Laws is mainly concerned with those situations where two territorial legal systems compete for application to an individual legal question, the aims of this branch of Applied Comparative Law are different. Here the problem is to exclude or minimize the dangers resulting from a clash of territorial systems. In other words, this branch of Applied Comparative Law is concerned with preventive jurisprudence, whilst the Conflict of Laws deals with the clinical side. These two departments of the law are correlated but not co-incident. There is another aspect of the problem. It has been said that the task of Private International Law is discharged as soon as the law governing the transaction has been ascertained.⁷⁶ It should be added that the task of Applied Comparative Law begins just where the Conflict of Laws ends, namely in examining the contents of the different legal systems and submitting the transaction to that system which is most appropriate to it.

In this branch of Applied Comparative Law there are

⁷¹ B. Keith, in 'The American Law Institute's Restatement of the Conflict of Laws', University of Toronto Law Journal, vol. i, 1936, 233 and 254.

⁷² *Donoghue v. Stevenson* [1932] A. C. 562, 598, 617.

⁷³ [1926] 1 Ch. 692, 709.

⁷⁴ *Ante*, p. 100.

⁷⁵ J. Beale, *The Conflict of Laws*, vol. i, 1.

⁷⁶ Professor G. C. Cheshire, *Private International Law*, 2nd ed. 10.

apparently two tendencies at work. The first of them aims at the unification of the laws of all civilized communities, while the second one is content with endeavouring to co-ordinate the different legal systems. Both tendencies have in common the desire to avoid a conflict of laws by organized means.

The unification of all laws is an ideal of dubious value. Some scholars maintain that it is in the reach of Comparative Law to ascertain the Common Law of all nations. Professor LÉVY-ULLMANN observes that the search for the *droit universel* dominated particularly the negotiations of the first international Congress of Comparative Law in Paris (1900). Professor SALEILLES thinks that the method of ascertaining the universal Common Law is to eliminate the national contingencies of the law and thereby to arrive at the '*droit idéal relatif*'. Professor DEL VECCHIO has expressed a similar view. Professor LAMBERT is in favour of seeking the objective by an examination of the unified efforts of the different national legislations, though he adds some doubts whether a total or partial unification of the private law of all nations is feasible at all.⁷⁷ Already in 1850 the Prince Consort, in a letter addressed to Professor LÉONE LEVY,⁷⁸ referred to 'the immense advantage to commerce generally' which would result from uniformity of the commercial laws of different countries. Other writers, such as Professor GUTTERIDGE,⁷⁹ regard complete unification of the law as a 'dream'⁸⁰ or reject the idea flatly, as Professor KADEN⁸¹ does. Others again, like Professor JENKS, discuss significantly the desirability of this ideal.⁸² The great divergence of these views is, it is believed, explained by the fact that the problem of the ultimate value of a *droit universel* depends, in Professor GUTTERIDGE's words, on 'the political aspect of the situation'.⁸³ The practical results of the tendencies towards universal unification are meagre, even in the province of mercantile law, which has always been considered as particularly suitable for such unification.⁸⁴ In a few instances, some unification of maritime law has been achieved, mainly as a result of the work done by the International Maritime Committee. The Maritime

⁷⁷ E. Lambert, *Fonction du droit comparé*, at p. 907.

⁷⁸ Léone Levy, *International Commercial Law*, 2nd ed. vol. i, at p. x.

⁷⁹ and ⁸⁰ H. C. Gutteridge, in 'An International Code of the Law of Sale', in the *British Year Book of International Law*, 1933, 76.

⁸¹ Erich-Hans Kaden, *op. cit.* 18.

⁸² Edward Jenks, *op. cit.* 63-64.

⁸³ H. C. Gutteridge, *op. cit.* 78.

⁸⁴ E. Lambert, in 'Comparative Law' in the *Encyclopaedia of the Social Sciences*, The Macmillan Co., New York, 1931, vol. iv, 128; H. C. Gutteridge, *op. cit.* 76; Edward Jenks, *op. cit.* 64.

Conventions Act, 1911,⁸⁵ and the Carriage of Goods by Sea Act, 1924,⁸⁶ are examples of these unifying tendencies. In other matters of mercantile law, these attempts have not been successful, though they were in some instances (*e.g.* the law of Sale and the law respecting Bills of Exchange and of Cheques) prepared by such an authoritative institution as the International Institute for the Unification of Private Law in Rome. Apparently unity of law by uniform legislation is attainable more easily if the different legal systems are of a cognate nature. In consequence, the success of the unificatory movement is more conspicuous in the limited sphere. Thus, the Imperial Economic Conference, 1923, recommended the introduction of uniform legislation by the Governments and Parliaments of the Empire on various subjects, including Carriage of Goods by Sea, the liability of State enterprises embarking on trade to taxation in other parts of the Empire, and the Immunity of State-owned Ships.⁸⁷ Further, the uniform laws on Bills of Exchange and Cheques, which were drafted as the result of the Geneva Conferences of 1930 and 1931, have been adopted by a considerable number of Continental States, including Germany, Italy, Holland, Belgium, Switzerland and the Scandinavian States.

Of greater importance than the unifying tendencies are the organized attempts to co-ordinate the existing legal systems. Legal practitioners, particularly in mercantile matters, are ready to adopt voluntarily Standard Regulations which are placed before them by authoritative international bodies. The aims which are pursued by these co-ordinating activities appear clearly in the Resolution of the International Law Association of 1921, which recommended the adoption of The Hague Rules, 1921, respecting bills of lading. That association expressed the view that 'international overseas trade and commerce would be promoted and disputes avoided, or the settlement thereof facilitated, if the rights and liabilities of cargo-owners and shipowners respectively are defined at an early date by Rules of a fair and equitable character with regard to bills of lading which shall be of general application'.⁸⁷ The outstanding examples of standard clauses designed for voluntary adoption are the York-Antwerp Rules, 1924, which deal with the adjustment of general average. Co-ordination sometimes leads

⁸⁵ 1 & 2 Geo. 5, c. 57.

⁸⁶ 14 & 15 Geo. 5, c. 22; for further examples of this branch of Applied Comparative Law, see Cheshire, *Private International Law*, 2nd ed. 12-19.

⁸⁷ International Law Association, 30th Report, 1921, vol. ii, 218.

to unification. This is exemplified by The Hague Rules, 1921, which, after having been adopted by the Brussels Conferences of 1922 and 1923, were eventually enacted in different countries, and particularly in Great Britain.⁸⁸

The organized attempts to arrive at a unification and co-ordination of the legal system are still in an initial stage. The partition of the world into two international legal families has rendered it difficult to arrive at a universal unity of the law, even in matters which, in consequence of the commercial intercourse between nations, are particularly suited for this course. It may well be that a consolidation of the laws within these two legal families has to precede the attempts of an ultimate assimilation. Such consolidation will, again, be the task of Applied Comparative Law.

⁸⁸ 14 & 15 Geo. 5, c. 22 (Carriage of Goods by Sea Act, 1924).

THE FOUNDATION OF TORTIOUS LIABILITY.*

GLANVILLE L. WILLIAMS.

IN a recent article under this title,¹ Professor Goodhart has added fresh fuel to a well-known controversy. What is the fundamental attitude of the Courts towards tortious liability?

It is usually assumed that Sir John Salmond's formulation of the issue is exhaustive. 'Does the law of torts', he asked in the year 1910, 'consist of (a) a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of (b) a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility?'² Quite a number of writers have agreed to have a battle on this question. Salmond himself took up the cudgels for view (b), which may be christened the particular theory, and he has found supporters in Sir John Miles,³ Professor Jenks,⁴ Mr. Landon,⁵ Dr. Stallybrass,⁶ Lord Justice Slesser,⁷ and now Professor Goodhart. Contrariwise, Sir Frederick Pollock had in the year 1887⁸ adopted view (a), the general theory, which has been championed also by Professor Dicey,⁹ Professor Winfield,¹⁰ Dr. Allen,¹¹ and (seemingly) Sir William Holdsworth.¹² It has also a following on the other side of the Atlantic.¹³

* A paper read before the Cambridge Law Club.

¹ (1938) 2 Mod. L. Rev. 1.

² The question is first specifically posed in Torts, 2nd ed. 8-9. Professor Goodhart errs in attributing it to Salmond's editor. The lettering in the above quotation is mine.

³ Digest of English Civil Law, 2nd ed. i, 545.

⁴ Book review in (1932) 14 J. Comp. Leg. 3rd Ser. 209.

⁵ Book review in (1931) 8 Bell Yard 25.

⁶ In Salmond's Torts, 9th ed. 19-20; cp. (1932) 10 Bell Yard 24. But he is in proleptic agreement with the other side.

⁷ The Law (1936) 146-7.

⁸ Law of Torts, 1st ed. 21-3, 13th ed. 1-2, 6, 20-3, 450; cp. the same writer in (1906) 22 L. Q. R. 118, (1910) 26 L. Q. R. 421, (1927), 43 L. Q. R. 149, and (1931) 47 L. Q. R. 589.

⁹ (1902) 18 L. Q. R. 4 (confining himself to *intentional* damage).

¹⁰ (1927) 27 Col. L. Rev. 1; The Province of the Law of Tort (1931), 32-9; Text-Book of the Law of Tort (1937) 15-21.

¹¹ Legal Morality and the *Ius Abutendi* (1924) 40 L. Q. R. 164, reprinted in Legal Duties (1931) 95.

¹² Book review in (1938) Journ. of the Soc. of Pub. Teach. of Law 38.

¹³ Ames, 'Tort because of a Wrongful Motive' (1905) 18 Harv. L. Rev. 411 (reprinted in the same author's Lectures (1913) 399, and in Selected Essays on the Law of Torts (1934) 150); (with qualifications) Jeremiah Smith (1907) 20

created new torts by the gradual and sometimes almost imperceptible extension of old torts.'¹⁸ To say that the law can be collected into pigeon-holes does not mean that those pigeon-holes may not be capacious, nor does it mean that they are incapable of being added to.

What, then, are we all arguing about? Perhaps the real difference of opinion is over the *excuse* that the Courts give for creating new torts. Thus Professor Goodhart continues the sentence just quoted with the remark: 'But this differs fundamentally from the view that they have the right *deliberately* to create new ones *based on a general principle of liability*' (italics mine). I am not quite sure of the force of the word 'deliberately'. At first sight it seems to mean that although the Courts may create new torts, they must not be aware of the fact. But this can hardly be Professor Goodhart's meaning. His real point seems to be that the Courts, in developing the law, must work, in the main, from what already exists. No member of the opposite school would wish to deny this.¹⁹ It is clear that every judge, however powerfully influenced by considerations of policy, is bound to consider the effect of his rulings upon the logical symmetry of the existing law. In a case of first impression he will naturally try to buttress his decision with every argument from analogy that he can find. And he will be slow to create a completely new remedy the limits of which he cannot foresee.²⁰ But all this is not to say that he has no power of conscious law-making. If the current convention denies this, honesty at least is on the side of the realists.²¹

It may be added that those who fight under Pollock's banner would hardly contend that the trend of legal development is always in the direction of the extension of liability. The garment may have to be taken in as well as let out. Consider, for instance, the present defence of inevitable accident in the action of trespass for personal injuries. Although there has never been any conclusive authority against the existence of

¹⁸ (1938) 2 Mod. L. Rev. at 8. Cp. Jenks (1932) 14 J. Comp. Leg., 3rd Ser. 210.

¹⁹ Cp. Holmes J. in *Stock v. New York N. H. & H. R. Co.* (1900) 77 Mass. 155 at 158; 58 N. E. 686 at 687; Winfield in (1935) 51 L. Q. R. 249.

²⁰ This 'administrative factor' has been well stated by Green, 'The Duty Problem in Negligence Cases' (1928) 28 Col. L. Rev. at 1035-45.

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this defence, it was for long the fashion to regard the liability as being strict; and the idea did not become *démodé* till 1891.²²

B.—IS THERE A GENERAL RIGHT NOT TO BE DAMAGED?

What I am principally concerned with in this paper is the synthetical or synoptical question. Can we, by adding together existing rules of liability, and drawing fair deductions from judicial *dicta*, tidy them into a single principle: that, subject to specific exceptions, the infliction of harm is tortious?²³ This is not identical with the former question. Even if the House of Lords were to recognize (say) the right of privacy to-morrow, and were to justify that recognition by the most sweeping assumption of legislative power, it would thereby do no more than affirm the power of the Courts to add new torts to those already existing. It would not, in itself, answer the question I am now asking.

The problem is, then, whether such a *motif* can be seen to underlie the present rules of the law of tort. On this, let it first be observed that no member of Pollock's school of thought maintains that all harm is tortious. Professor Winfield, for instance, says only that unjustifiable harm is tortious, and that it is for the Court to decide whether harm is justifiable.²⁴ The trouble is that 'unjustifiable' is one of those words that so easily turn mendicant, and beg questions. If it means 'contrary to law', Professor Winfield's statement is unassailable; more, it is self-evident. In effect, he is then asserting what logicians call an 'identical proposition'.²⁵ But if that is all that is

²² *Stanley v. Powell* [1891] 1 Q. B. 86.

²³ The question is sometimes posed more tersely in the form: Is there a law of tort or simply a law of torts? But the antithesis is illusory. It would be about as sensible to ask: Is there *law* or are there simply *laws*? Is there *crime* or are there simply *crimes*? The answer in each case is that the two conceptions do not exclude each other. A *law* is part of *law*. A *tort* (like a *crime*) is either (1) a concrete wrongful act or (2) a species of wrong coming within the generic conception of *tort* (or *crime*). No theory of liability is involved in this, and hence there is no need for anyone, however conservative, to fight shy of the phrase 'law of tort'.

²⁴ Text-Book, 19—21.

²⁵ That is, a mere statement of identity: 'unjustifiable' harm = 'tortious' harm, where 'unjustifiable' is meant to bear the same meaning as 'tortious'. (We may put aside the point that harm may be caused unjustifiably and yet not by a tort—for instance, by a breach of contract.)

Since I shall have more than one occasion to refer to identical propositions of this sort, let me say at once that there is no objection to them as such, provided that no conclusions are drawn from them. The point is simply that they must not be made the foundation of an argument. Yet it is common to find them pressed into this service. To illustrate this, there is the story of the man who abused his wife, was unfaithful to her, was dishonest in business, and was not

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meant, it is hard to see what difference there is between this view and Salmond's. It looks like the dispute between the two ladies, one of whom thought herself extremely conventional because bad form shocked her, and the other of whom thought herself extremely unconventional because nothing shocked her, except, of course, bad form.

What the proponents of the general theory must prove is not that every invasion of a legal right is a legal wrong, for that is axiomatic,²⁶ but that every infliction of damage is, in the absence of specific justification, the invasion of a legal right. *Will myrist*
✓ In other words they must show that everyone has, in general, a right not to be damaged²⁷ by anybody else. If this proposition is true, it follows that a plaintiff who has been damaged by the defendant is bound to have judgment in his favour unless either the case falls within an established exception to liability or the Court feels that on grounds of public policy a new exception ought to be created.

But we need to know a little more about what is being asserted. If there is a general right not to be damaged, what kind of right is it supposed to be? For all rights are not on the same footing; they have different degrees of sanctity. (1) Some are correlative to strict duties, and may be infringed without actual fault—*e.g.*, the right of the plaintiff in *Rylands v. Fletcher*.²⁸ (2) Some are regarded as being infringed only by intentional or careless conduct—*e.g.*, the right of a traveller on the highway to personal safety. (3) Some can be infringed

particular in his use of language, and yet his life on earth was described in the lines :

This man maintained a wife's a wife,
 Men are as they are made,
 Business is business, life is life;
 And called a spade a spade.

Legal arguments of equal inconsequence will be noticed later.

²⁶ Professor Winfield very properly omits from his judicial anthology (27 Col. L. Rev. 3—6) some remarks that are mere logical roundabouts of this nature. Thus Lord Campbell said in *Lynch v. Knight* (1861), 9 H. L. C. 577 at 589 : 'Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of *loss* and *injury* from the act complained of, we are bound to say that this action [*i.e.* an action on the case] lies.' And in *Bowen v. Hall* (1881) 6 Q. B. D. 333 at 337, Brett M.R. said : 'Whenever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie.' Here the words 'injury', 'wrongful act', rob the statements of significance for our purpose; they are of interest only on the scope of the action of case.

²⁷ Let me say here that throughout this paper the words 'damage' and 'interest' are used (unless otherwise specified) with a purely factual meaning. 'Interest' is, in the words of the American Restatement, Torts, § 1, 'the object of any human desire' (cp. Pound in Selected Essays on the Law of Torts (1924) 87, note). 'Damage' signifies any frustration of such a desire.

²⁸ (1868) L. R. 3 H. L. 330.

only by intentional conduct—*e.g.* (speaking broadly) the right of a trespasser to personal safety. (4) Most tenuous of all, some can be infringed only by intentional conduct of a particular kind, namely, intentional conduct actuated by an improper motive (malice)—*e.g.*, the right not to be prosecuted without cause. Into which of these categories are we to fit the alleged general right not to be damaged? Since some of its protagonists are not very explicit on the point, we have to test it under each of the four heads in turn.

(1) *Is there a general right not to be damaged, irrespective of the defendant's fault?*

It is difficult to think that anybody, and least of all the man who exposed the 'myth of absolute liability',²⁹ would answer this question in the affirmative. It is true that the law of tort is shot through with strict liability, but there is no general principle.

(2) *Is there a general right not to be damaged intentionally or carelessly?*

This seems to be the utmost for which any proponent of the general theory contends. Thus Pollock, in a book review, put his position thus: 'In our judgment the common law is coming, if it has not already come, to hold that a man who wilfully or negligently causes temporal damage of any kind is liable unless he can show justification or excuse.'³⁰ Putting aside for a moment the question of intentional damage, was this eminent jurist right on the point of negligence?³¹

At first sight it may seem that he was. Pollock regarded negligence as a specific tort in itself, a tort of wide application; and his view was followed and elaborated by Professor Winfield. We all know that their position has now been vindicated by the highest tribunals.³² But that is not the end of the matter, for negligence still supposes the existence of a legal duty of care.³³ Whether there is a duty of care is a question of law for the Court; whether the defendant has broken the duty by

²⁹ Winfield in (1926) 42 L. Q. R. 37.

³⁰ (1910) 26 L. Q. R. 421. Cp. the same author's book review in (1931) 47 L. Q. R. 589, which is not so precise.

³¹ Or, as I prefer to say, 'carelessness'. The use of the word 'negligence' is a *petitio principii*, because it presupposes a legal duty of care.

³² A recent instance is the dictum of Lord Wright in *Lindsey C. C. v. Marshall* [1937] A. C. 97 at 121.

³³ By 'duty of care' I understand a legal duty imposed upon the defendant not to cause damage of a specified kind to the plaintiff by careless conduct.

careless conduct is (roughly speaking) a question of fact for the jury. So the problem becomes: Is there a general duty of care, subject to specific exceptions, or simply a number of particular instances of duty?

Now it is certain that some rules laying down a duty of care are very broad. Thus, there is (i) a duty not to cause physical harm to other persons or to their property by positive acts, (ii) a duty imposed on the possessor, custodian or guardian of chattels, lunatics or children to control them, and so on. The list could be extended very considerably. Yet some rules of absence of duty are equally sweeping. What are the upholders of the general theory to say of them?

This much, at least, is clear, that a case can never be beyond criticism if it proceeds *solely* on the facile ground that the defendant was under no duty. For this is a conclusion, not a reason. As Professor Leon Green puts it, 'when we say in a particular case that plaintiff had a right, defendant was under a duty,'—or the contrary—'this but means that we have already passed judgment'.³⁴ The inquiry that lies before us, therefore, is *why* particular defendants have been held to be under no duty. Will the reason be found to square with the general theory of liability?

One case may be put aside at the outset. In the absence of special operative facts creating a duty to act, there is no liability for mere supine inaction. The law does not always oblige one to play the good Samaritan. It feels no bite in the words of the poet:

Thou shalt not kill; but need'st not strive

Officiously to keep alive;

for charity cannot be made the subject of legal regulation. This is not to say that there can never be a legal duty, in the absence of contract or relationship, to help others. Take, for instance, the favourite illustration of the child drowning in shallow water. Given a sufficiently glaring case, few ordinary people would not agree that there ought to be liability,³⁵ and even legal writers are coming to speculate whether this may not be right.³⁶ Yet it will be conceded that the duty, if it

³⁴ (1928) 28 Col. L. Rev. at 1021.

³⁵ J. S. Mill, indeed, assumed that there would be liability: *On Liberty*, 3rd ed. 24-5.

³⁶ See Ames, 'Law and Morals' (1908) 22 Harv. L. Rev. 97 at 111-13 (reprinted in the same author's *Lectures* (1913) 435 at 450-2, and in *Selected Essays in the Law of Torts* (1924) 1 at 15-17); Bohlen, 'Moral Duty to Aid Others' (1908) 56 U. of Pa. L. Rev. 217, 316 (reprinted in his *Studies* (1926) 291; see particularly p. 339); Pound, *Law and Morals* (1826) 67-9; Cardozo, *Paradoxes of Legal Science* (1928) 25-6; Allen, 'Legal Duties' (1931) 40 Yale L. J. 331 at

exists, must be confined to the grosser instances of physical peril. It remains true to say that the law cannot oblige everyone to the altruistic conduct that may be expected of the reasonable and prudent man. Hence these cases of naked omissions must be excluded at the start from the general theory of liability.³⁷

When we pass to cases in which the defendant has done some positive act or is in control of some person or thing, we shall find a much wider area of liability for carelessness. Yet even here there are many instances where the Courts have denied or restricted the legal duty of care. What is their reason?

Professor Winfield seems to suggest that the duty rules, in their practical effect, are simply alternative methods of expressing other rules of law. At any rate he states that 'after studying many cases of negligence in which duty was discussed, I have not found one which could not have been just as well decided on some ground not depending on duty at all,—sufficiency of evidence for the jury, contributory negligence, remoteness of damage, inevitable accident, *volenti non fit iniuria*'.³⁸ If this conclusion is true it seems to prove the general theory of liability. What we have to inquire is whether it is true.

Time presses, and it is not possible for me to go into the many cases in which Professor Winfield's suggestion is strikingly apt. What I am concerned with is whether it is true of *every* case, and I trust that I shall do no injustice to the merits of the suggestion if I concentrate at once on some of the instances that seem to be most recalcitrant to it. Some cases, as it seems to me, can be explained on no other ground than that the interest of the plaintiff, though perhaps protected against intentional invasion, is not regarded as being suitable for protection against careless invasion. If my understanding of them is right, they kill the general theory of liability in respect of the careless infliction of damage.

As a first illustration, take the plaintiff's interest in the due performance by others of their contracts with him. It is now a tort intentionally to interfere with this interest, but, speaking

367-70 (reprinted in his *Legal Duties* (1931) 156 at 204-8); Cecil A. Wright in (1932) 10 *Can. B. Rev.* 11; (1937) 35 *Mich. L. Rev.* 503. The American Law Institute's *Restatement, Torts*, §§ 314, 315, 321-5, gives a clear picture of the present law.

³⁷ As Ames and Pollock excluded them.

³⁸ 'Duty in Tortious Negligence' (1934) 34 *Col. L. Rev.* 41 at 64. See also Buckland in (1935) 51 *L. Q. R.* 637. Professor Buckland seems to attach a narrower significance to the phrase 'duty of care' than I give it, and the same may be true of Professor Winfield.

generally, it is not a tort inadvertently to do so. This idea manifests itself in two ways. In the first place, one who invites another to do an act is under no duty to inquire whether that act is a breach of a contract with the plaintiff.³⁹ In the second place, a tort against X that causes Y loss in respect of his contract with X is not necessarily a tort against Y.⁴⁰

Closely akin to this is the reluctance of the law to throw its mantle of protection over the interest that one person may have in the well-being of another. It is true that a husband has an action for injuries to his wife, and a master for injuries to his servant, whereby he suffers damage by way of loss of society (*consortium*) or services: but this is a survival from an earlier day when the husband was regarded as possessing his wife, and the master his servant.⁴¹ Hence the rule does not, in general, work the other way round. As Blackstone put it, 'in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom: while the loss of the inferior by such injuries is totally unregarded'.⁴² No action has yet been sustained (except under Lord Campbell's Act) by a wife for injury to her husband, or by a child for injury to his parent; and not even Lord Campbell's Act helps the lover who loses his lass (or, what may be a more serious matter materially, the lass who loses her lover), or the servant who loses his master.⁴³ It may be said that these are merely rules of remoteness of damage, but I think that the phrase 'remoteness of damage' in such

³⁹ *British Industrial Plastics, Ltd. v. Ferguson* [1938] 4 All E. R. 504. The rule may perhaps be explained on the ground of business expediency. As Lindley L.J. said, in a different context, 'if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country' (*Manchester Trust v. Furness* [1895] 2 Q. B. at 545).

⁴⁰ *Cattle v. Stockton Waterworks Co.* (1875) L. R. 10 Q. B. 453.

⁴¹ Thus even trespass *vi et armis* formerly lay for an assault upon a servant or wife: Reg. Brev. ff. 94b, 102a; *per* Lord Parker in *Admiralty Commissioners v. S. S. Amerika* [1917] A. C. 38 at 44-5. Yet a father has no legal interest in his child unless it happens that the child can by some stretch be regarded as his servant. A mere parental interest, standing alone, is not accorded protection; the protection it gets is parasitic upon the protection of pecuniary interest. This does not fit very well into the general theory. If the general theory is right, why is it that a father cannot sue directly for his daughter's seduction, irrespective of the technicalities of the present mode of proceeding?

⁴² Commentaries, iii, 142.

⁴³ I am not speaking of an intentional interference *with the relation*; here the protection is somewhat wider. See *Gray v. Gee* (1923) 39 T. L. R. 429; but *cp. Morrow v. Yannantuono* (1934) 152 Misc. 134, 273 N. Y. Supp. 912, noted in (1934) 4 Brooklyn L. Rev. 217. See Generally Green, 'Relational Interests' (1934-5) 29 Ill. L. Rev. 460, 1041; (1935) 30 Ill. L. Rev. 1, 314; (1936) 31 Ill. L. Rev. 35, where there is also a discussion of similar restrictive rules in the law of defamation.

an application conceals the truth, which is that the plaintiff's interest is not protected.

Again, there is no duty not to filch the name of a neighbour's house or not to adopt his patronymic, even though the result of doing so is to cause him annoyance and inconvenience.⁴⁴ Nor, as the law now stands, is there any duty of care not to dig in one's land in such a way as to cause the ruin of a neighbour's newly built house.⁴⁵ It is possible that in both these cases the Courts may be persuaded to give a remedy if the harm was actually intended (*i.e.* desired),⁴⁶ but at all events there seems to be no liability for mere heedlessness or recklessness.

Of course every case of this sort can be expressed in the form of a limited rule of non-liability, but it would, I think, be rather artificial for the proponents of the general theory to call them cases of 'justification or excuse'. It is not so much that the defendant has a justification or excuse for what he has done as that the law sees no reason for protecting the plaintiff's economic or other interest in this particular respect. If this is so, the question whether the plaintiff has or has not a right not to be damaged depends not upon a neatly rounded theory of liability but upon the facts of the particular case. To revert for a moment to my last illustration, when the plaintiff's house has stood for twenty years and the other requirements of prescription have been satisfied, the law *will* see a reason for giving the plaintiff a right not to be damaged by the removal of support. The difference between the two cases (new and old houses) lies not in what the defendant has done but in whether the plaintiff has a right. In the same way the law sees a reason for protecting the enjoyment of light after the lapse of twenty years, but not before; and not the enjoyment of view in any circumstances. It sees a reason for protecting the enjoy-

⁴⁴ *Per* Lord Chelmsford in *Du Boulay v. Du Boulay* (1869) 6 Moo. P. C. (N.S.) 31 at 47; *Day v. Brownrigg* (1878) 10 Ch. D. 294. Pollock thought it enough to say of the plaintiff's claim in the latter case that 'such a right is not known to the law' (Torts, 319). Yet elsewhere he admitted that his theory 'would be stultified if "just cause or excuse" included the fact that the harm done to the plaintiff could not be ear-marked as the violation of a known specific right' ((1906) 22 L. Q. R. at 118).

⁴⁵ The authorities are reviewed in *Dalton v. Angus* (1881) 6 App. Cas. 740. Lord Penzance, while recognizing the rule, had no great regard for it; see his remark at p. 804. In the United States such a duty has been imposed (*Corpus Juris*, i, 1216-17). Moreover, even in England, there is a duty (apparently strict) not to cause the subsidence of (a) land in its natural state or (b) land weighted by buildings that do not increase the lateral pressure. If this duty is broken the person affected may recover as parasitic damages the injury to the buildings as well as to the land: *Hunt v. Peake* (1860) Johns. 705; *Stroyan v. Knowles* (1861) 6 H. & N. 454; *cp. Corpus Juris*, i, 1215; (1935) 19 Minn. L. Rev. 587.

⁴⁶ Below, p. 125.

ment of a flow of water along a defined channel, but not if there is no defined channel.⁴⁷ So also with the prescriptive right to a flow of air.

To sum up this section, it may be said that some rules imposing a duty of care are wide, and that even the rules negating a duty of care are sometimes, though not always, intended to reflect the fact that the defendant will not normally have been guilty of carelessness causing the damage. Perhaps this is an approximation to the general theory of liability, but it does not fit exactly. And even if we come eventually to outgrow the requirement of duty as a fetter upon the law of negligence, and put carelessness upon the same legal footing as intention, that will still not give us a general duty not to cause harm carelessly unless there is a general duty not to cause harm intentionally. To the latter question I now turn.

(3) *Is there a general right not to be damaged intentionally?*⁴⁸

This is all that Pollock contended for in his most guarded moments,⁴⁹ and it is the only proposition that some of the judicial *dicta* can be used to support.

One thing, at least, is certain: liability for damage caused intentionally can be no less extensive than liability for damage caused negligently. That is plain; but can we go farther? Can we make so bold as to say that in general an action lies for all harm caused intentionally even though there is no duty of care? It will help us to answer this question if we distinguish between omissions and positive acts.

As regards intentional *omissions* to act, it may be that the rules are not, in general, any wider than the negligence rules. If a master in good faith refuses to give a reference to a servant, it is clear that he is not liable in tort. Nor, perhaps, does the

⁴⁷ It seems to me that Professor Winfield recognizes this argument when he explains *Mayor of Bradford v. Pickles* by saying that the defendant was 'merely using his own land in a manner which the law considers unobjectionable' (Text-Book, 19). Since there appears to be no special virtue in 'using one's own land' as distinct from other types of conduct, this amounts to saying that a plaintiff who has been damaged cannot recover if the defendant was 'merely [acting] in a manner which the law considers unobjectionable'. In other words, it means that a plaintiff who has been damaged can recover only if the defendant was acting in a manner which the law considers objectionable—i.e. only if the defendant was acting contrary to law, in violation of a right in the plaintiff. So what remains of the quarrel with Salmond?

⁴⁸ It should be noticed that recklessness (i.e. advertent negligence) is frequently, though not always, classed with intention.

⁴⁹ See Goodhart, 2 Mod. L. Rev. at 2—3. I do not know why Professor Goodhart assumes that by 'wilful harm' Pollock meant 'harm inflicted merely for the purpose of harming'. Some types of harm may be inflicted wilfully (i.e. intentionally) and yet in good faith. Pollock himself accepted the ruling in *Mayor of Bradford v. Pickles* [1895] A. C. 587, that motive is immaterial.

addition of an improper motive make any difference. Suppose that in *Cavalier v. Pope*⁵⁰ Mrs. Cavalier had been able to prove that Mr. Pope entertained some animosity towards her, and had deliberately refrained from repairing the house in the hope that she would fall through the floor. It is probable that this would not have bettered her case.⁵¹ The conclusion may be that there is no liability for damage caused intentionally by an omission to act unless *either* it comes within one of the specific torts (like nuisance), *or* there is a duty of care within the negligence rules.

On the other hand, if harm is deliberately engineered by a positive act, then very frequently there is liability irrespective of whether there has been a breach of a duty of care. Thus, there is liability for intentionally injuring a trespasser,⁵² or for intentionally inducing a breach of contract. These and many other examples that might be given make the general theory, so far as it concerns intentional harms, seem very close to the truth.

Yet again there are difficulties: some interests are, for one reason or another, left unprotected even against intentional invasion. Let me come at once to the most obvious illustration of this.

As a general principle of law, apart from the question of malice, it is not wrongful to prevent a person from acquiring rights. Suppose that A and B are walking along a path; they both see a gold watch lying in front of them, and B runs forward and gets it first. One need not have a profound knowledge of the law to realize that B does not thereby commit any tort against A, even though by his conduct he has deprived A of the watch. No system of law, this side of the looking-glass, could have it otherwise. Again B does not generally commit a tort against A simply by refusing to contract with him, or by persuading X not to contract with him. Otherwise, as Lord

⁵⁰ [1906] A. C. 428.

⁵¹ In *Gautret v. Egerton* (1867) L. R. 2 C. P. 371 Willes J. went even farther, and said that 'no action will lie against a spiteful man who seeing another running into a position of danger merely omits to warn him'; but see above, p. 118. For other examples see Terry in (1904) 20 L. Q. R. 20; Ames in (1905) 18 Harv. L. Rev. 416, n. 1; Carpenter in (1928) 41 Harv. L. Rev. 752-3; *Kearney v. Lloyd* (1890) 26 L. R. Ir. 268.

⁵² *Bird v. Holbrook* (1828) 4 Bing. 628; *Townsend v. Wathen* (1808) 9 East 277. Yet the cause of action does not seem to fit into any of the recognized torts, except possibly an amorphous tort of 'intentional physical harm' (cp. Winfield, Text-Book, 240-3). It is at least arguable that if negligent wrongdoing is a specific tort—and we now have the highest judicial authority for saying that it is—then intentional wrongdoing must be another specific tort. But it is only a question of words.

Herschell remarked, a temperance crusade would be unlawful.⁵³ On the same principle, B can with impunity marry the object of A's devotion, steal A's maid by a tempting offer of higher wages, blackball A's candidature for B's club, snap up a bargain or carry off a sports prize upon which A has set his heart, persuade A's Aunt Matilda to leave all her money to charity instead of to him, and so on. All these cases are variations on the theme of *Allen v. Flood*.⁵⁴

How are the proponents of the general theory to cope with them? They are precluded from saying simply that A has no right that is infringed, for their position is that A has a general right not to be damaged, and here he has been damaged. What justification or excuse can they invent for B? Let us see.

The case of the gold watch is easy; so are the cases of forestalling the bargain and refusing to contract. We can formulate the principle like this. 'Where the law bestows a power or a privilege⁵⁵ upon persons generally, such as the power to acquire title to lost property by appropriation or the power to enter into contracts, the exercise of such a power or privilege by B is not a tort to A merely because A is thereby prevented from exercising, or from obtaining the fruits of exercising, his similar power or privilege. Nor is the refusal to exercise such a power a tort to A merely because A is thereby deprived of some advantage that would otherwise have followed.' This principle may partly explain Pollock's somewhat enigmatic reference to 'the exercise of a common right' as a defence in tort.⁵⁶ With a little persuasion we can perhaps coax the case

⁵³ *Allen v. Flood* [1898] A. C. 1 at 9.

⁵⁴ Last note. I am not here concerned with the possibility of malice affecting the defendant's liability; that is reserved for the next section.

⁵⁵ I use these terms with the meanings assigned to them by Hohfeld. Although they have not yet gained much currency in this country, they are well established in the United States and have been adopted in the Restatement.

⁵⁶ Torts, 13th ed. 23, 152-62, 637-8. Professor Goodhart, who seems to be puzzled by Pollock's phrase, does not give the second and third references (2 Mod. L. Rev. 3). Among Pollock's examples of 'common' or 'ordinary' rights, which my suggested principle fits, are: (1) trade competition, (2) interference with percolating water, (3) refusal to enter into a contract, (4) use of a name. (Of course in strict language none of these is a 'right'; but this wide use of the term is justified by its convenience.) On the other hand Pollock suggests other examples of 'the exercise of common rights' which my principle does not fit. They are: (1) 'a man's use of his own land in the common way of husbandry, or otherwise for ordinary and lawful purposes' (p. 153), (2) opening 'a new window so as to overlook my garden' (p. 158), (3) blocking windows that have no prescriptive right to light (p. 158), (4) inevitable accident resulting from traffic on the highway (p. 638). In these four contexts the phrase 'exercise of a common right' is no more than a label for miscellaneous cases in which the defendant is regarded as not being liable. At p. 419 Pollock gives the expression 'common right' another twist of meaning: it is the kind of right that is infringed by a common (or public) nuisance.

of maid-stealing into the same category; inducing X, the maid, lawfully to end her contract with A in order to serve the inducer has the same effect as inducing X never to enter into a contract with A. But how does it help us to deal with the temperance crusader? He does not wish to deal in alcoholic potations himself; his sole desire is to damp their sale by others. He wishes not to exercise a common right but to prevent the exercise of a common right. Apparently, then, we have to go farther than the principle just stated. We must recognize a general justification for persuading X not to contract with A. And, to meet the case of the revoked will, we must also recognize a justification for persuading X not to make a gift to A. I think it must be admitted that both these explanations are very forced. The real reason, as it seems to me, why Aunt Matilda's disappointed nephew has no remedy against the meddler A is not because of a principle of law allowing people to interfere with the making of gifts, but because the nephew has not obtained any right in, or to, or in respect of his aunt's property that the law is willing to protect against conduct of this sort. If this is so, the question of 'tort or no tort?' comes back to one of 'right or no right?'⁵⁷ But once that happens it is the end of a comprehensive principle of liability for intentional harm. We are back to the 'identical proposition'.

So far we have not discussed the question whether the addition of an improper motive in cases of this sort can make any difference to the result. This will be the last question to occupy us.

(4) *Is there a general right not to be damaged intentionally and in bad faith?*⁵⁸

It may be said at the outset that in answering this question

⁵⁷ That is, of course, right or no right *against the defendant*. It is possible for the proposed donee to be given a legal right against the defendant, obliging him not maliciously to interfere with the proposed bounty, even though he has no legal right against the proposed donor (see next section). But I do not think that any system of law could create a right not depending upon the defendant's bad faith.

⁵⁸ The proper definition of the term 'bad faith', with its alternatives '(express) malice', 'improper motive', is a matter of considerable difficulty. For the present purpose I am content to take it in its narrowest possible meaning, 'unalloyed spite', or as Holmes J. phrased it 'disinterested malevolence'. Whatever else it means, 'bad faith' certainly denotes the infliction of damage for its own sake, *i.e.* for the pleasure that the inflicting of it gives and for no other reason. How far the term extends beyond this to cases of mixed motive is too complicated an inquiry to be pursued here. In practice motives usually are mixed, and it is rare to find a perfect specimen of old-fashioned malice.

For comparative treatments of the subject see H. C. Gutteridge, 'Abuse of Rights' (1933) 5 C. L. J. 22; H. C. Leake, 'Abuse of Rights in Louisiana' (1933) 7 Tul. L. Rev. 426.

we are concerned only with positive acts. Malicious omissions to act have already been disposed of.

Before risking any generalization, let us take the specific rules suggested by the authorities. To start with, it must be admitted that there are several cases where, as the law now stands, the addition of a wrongful motive does not alter the legal complexion of an act. The main instances of this may be given.⁵⁹ First, rights given by contract are usually exercisable irrespective of motive.⁶⁰ So also with legal remedies for rights (contractual and other); if A owes a debt to X, or has committed or proposes to commit some legal wrong towards X, and X resorts to some judicial or extra-judicial means of redress, this is not damage of which the plaintiff is entitled to complain, and the existence of bad faith is immaterial. Examples are the right to make a debtor bankrupt, and the right to exclude trespassers. It may be added that this principle probably applies even though X is not the defendant. Suppose that A, in conversation with B, slanders X; it seems that B may with perfect safety carry tales to X and so get A involved in a slander action.⁶¹ Nor does the mere causelessness of malicious legal proceedings necessarily make them actionable.⁶² Each of these instances of licensed knavery is justifiable, in some degree, by considerations of policy. Then, in the sphere of defamation, there is the absence of liability for words spoken—even though maliciously—on an occasion of absolute privilege, and the (seeming) absence of liability for defamatory words that are true. The list may be concluded with the specific rule in *Mayor of Bradford v. Pickles*⁶³: that where both plaintiff and defendant have a

⁵⁹ See generally Ames, 'Tort because of a Wrongful Motive' (1905) 18 Harv. L. Rev. 411.

⁶⁰ Per Wills J. in *Allen v. Flood* [1898] A. C. at 46: 'Any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right.' But this assumes that the right is given by the contract; one must not forget the doctrine of public policy. Moreover, it is not impossible that some abuses of contractual right may be foiled by the issue of an injunction. In *American Bank and Trust Co. v. Federal Reserve Bank* (1921) 256 U. S. 350; 41 Sup. Ct. 499; 65 L. Ed. 983; 25 A. L. R. 971, where the defendant made a practice of holding back cheques and then presenting them to a bank in unduly large numbers, for the purpose of embarrassing it, the Supreme Court of the United States granted an injunction. 'The word "right"', said Holmes J. 'is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion.'

⁶¹ It may conceivably be different if B actively presses X to sue A, desiring only to gratify a private spite against A. Cp. the case put by Ames, 18 Harv. L. Rev. at 420.

⁶² There is no liability for malicious and causeless civil actions; nor even for malicious and causeless prosecutions and bankruptcy proceedings if the instituter reasonably, though mistakenly, thought that there was just cause.

⁶³ [1895] A. C. 587. It is worth noticing, as a matter of academic interest, that ten years before *Bradford v. Pickles*, Pollock had suggested a contrary

under P's
land.

in highway.
'common right' to appropriate something (e.g., percolating water or a lost watch), and the defendant succeeds in appropriating or diverting it first, the motive by which he is prompted is immaterial.

This brings us to the very much wider and altogether regrettable *dicta* in *Pickles's Case*, which were repeated a few years later in *Allen v. Flood*. Here we meet, once more, that fertile source of error, the identical proposition. 'If', said Lord Halsbury, 'it was a lawful act, however ill the motive might be, he [the defendant] had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it.'⁶⁴ It needs but a moment's reflection to show that these two sentences say nothing at all. They are like algebraic equations in which the two sides cancel out. 'If it was a lawful act, . . . he had a right to do it.' Of course. But the question was whether a wrongful motive might not make unlawful an act otherwise lawful, and the answer to that could not be established by a proposition asserting identity.⁶⁵

Moreover, if Lord Halsbury and the other noble and learned lords meant to answer the question with a flat negative, it is enough to say that they scarcely give any reason of substance for their opinion,⁶⁶ and that it is inimical to any sound develop-

conclusion 'on principle' (see his Indian Civil Wrongs Bill, Torts, 13th ed. 638). Most jurisdictions in the U.S.A. allow only reasonable use of percolating water; and a malicious use is not regarded as reasonable: see E. W. Huffcut, 'Percolating Waters' (1904) 13 Yale L. J. 222; Wigmore, Cases on Torts (1912) ii, App. A, ss. 111, 272.

⁶⁴ *Bradford v. Pickles* [1895] A. C. at 594. The preceding and succeeding sentences are not open to objection on the score of logic, but they are comparatively harmless because they are limited to the specific case before the House.

⁶⁵ It seems to me that this fallacy is at the bottom of as much false reasoning as can be found anywhere in tort. Consider, for instance, the oft-quoted *dictum* of Parke B. in *Stevenson v. Newnham* (1853) 13 C. B. 285 at 297: 'An act which does not amount to a legal injury, cannot be actionable because it is done with a bad intent.' This *dictum* is perfectly correct, and perfectly useless. Given the legal meaning of 'injury', it cannot by any possibility be untrue. Yet Lord Macnaghten declared that the 'sum and substance' of *Allen v. Flood* (which occupies 180 pages in the Law Report) is no more than this: see *Quinn v. Leatham* [1901] A. C. at 508-9. Cp. [1898] A. C. at 106 (Lord Watson), 124 (Lord Herschell), and 167-8 (Lord Shand). The same insidious platitude is to be found in Pollock, Torts, 23: 'Harm done without excuse cannot be made more wrongful than it is by the addition of bad faith or personal ill-will, nor made lawful by its absence.' The statement at pp. 336-7: 'But certainly *Allen v. Flood* shows that a finding of malice will not supply the want of a cause of action', is either platitudinous or too wide. See also the speech of Lord Ashbourne in *Bradford v. Pickles* at p. 598: this starts by assuming that 'Mr. Pickles has acted within his legal rights throughout', and after this there is nothing left to argue.

⁶⁶ Except a vague fear that (1) the jury is not a suitable tribunal for the determination of motive (which has not been felt in the action for malicious prosecution), and correlatively that (2) inquiry into motives will tend to unsettle established rights. See *Allen v. Flood* [1898] A. C. at 118-19 (Lord Herschell), 153 (Lord Macnaghten). One is reminded of the timidity of the 'strict court

ment of the law of tort, and fails to account for a number of particular rules that are inconsistent with it. For instance, despite the unsettling effect of these two cases, Macnaghten J. not long ago had the courage to reaffirm a well-established rule of the law of nuisance, which is that the presence of a sinister motive may turn conduct into an actionable nuisance though, but for this motive, the plaintiff would have been required to put up with it.⁶⁷ In the same way, the success or failure of an action for defamation may depend upon whether the words were published maliciously. Several specific torts are founded on the idea of a wrongful motive, and there is no need to assume that they are incapable of being added to. Thus although there is no proprietary right in the name of one's house, there ought to be a remedy—at least by way of injunction—for the malicious appropriation of it.⁶⁸ Although there is no natural right of support for buildings, it would be deplorable to allow a person to bring about the ruin of his neighbour's house out of sheer vindictiveness.⁶⁹ It has been suggested, in effect, that there is no liability for erecting a 'spite fence'⁷⁰ (that is, a screen put up for the purpose of depriving the plaintiff of light, air or view), but it is submitted that there is nothing in the decision on the narrow facts in *Bradford v. Pickles* to necessitate this conclusion. (In *Bradford v. Pickles* the plaintiffs' grievance

of Venice', when it was asked to season contractual rights with a doctrine of public policy.

'Twill be recorded for a precedent,
And many an error, by the same example,
Will rush into the state: it cannot be.

⁶⁷ *Hollywood Silver Fox Farm v. Emmett* [1936] 2 K. B. 468. To the authorities cited in the judgment there may be added the *dicta* in *Bamford v. Turnley* (1862) 3 B. & S. 62 at 82-3, and *Harrison v. Southwark, etc. Water Co.* [1891] 2 Ch. 409 at 414. It is odd that in *Bradford v. Pickles* no argument seems to have been addressed to the House on the point of discoloration. Cp. *Ballard v. Tomlinson* (1885) 29 Ch. D. 115.

⁶⁸ The question was left open in *Day v. Brownrigg* (1878) 10 Ch. D. 294; cp. as to titles, *Earl Cowley v. Countess Cowley* [1901] A. C. 450 at 453. For an interesting discussion of the scope of the injunction see Zechariah Chafee, Jr., 'Does Equity Follow the Law of Torts?' (1926) 75 U. of Pa. L. Rev. 1. As this writer very properly observes: 'So long as judges are not expressly prohibited from using such a legitimate remedy as the injunction for a purpose which it will effectually obtain, the non-existence of an action for damages should be immaterial.'

⁶⁹ There are *dicta* in two American cases that an improper motive creates liability: *McGuire v. Grant* (1856) 25 N. J. L. 356; 67 Am. D. 49; *Winn v. Abeles* (1886) 35 Kan. 85; 10 Pac. 443; 57 Am. Rep. 138. It is true that a landowner must be conceded the right of removing the lateral support from his neighbour's house if there is no other way of preventing him from acquiring an easement of support. Cp. *Dalton v. Angus* (1881) 6 App. Cas. 740, at 775 (Fry J.), 785-6 (Bowen J.), 796-7 (Lord Selborne L.C.). But this excuse would be taken away if the neighbour were to offer to stop the prescriptive period running by an appropriate agreement.

⁷⁰ *Per* Lord Penzance in *Capital and Counties Bank v. Henty* (1882) 7 App. Cas. 741 at 766; *per* Wills J. in *Allen v. Flood* [1898] A. C. at 46.

was simply that they would have liked to appropriate something that the defendant succeeded in appropriating or diverting first. We must now take it that in a case like that malevolence makes no difference.) But a plaintiff who sues for the erection of a spite fence is complaining of a wanton interference with his existing amenities.⁷¹ Even where the conduct of which the plaintiff complains has simply prevented him from acquiring rights, the law may seize upon the means used,⁷² or the fact of numbers acting in bad faith, to create liability. If, then, each member of a combination acting in bad faith is liable, it is difficult to see why one person acting in bad faith should not also be liable. *Allen v. Flood* need not be an insuperable obstacle to such a conclusion, for there it was found as a fact that the defendant had not caused the plaintiff's damage,⁷³ and moreover the majority Lords were not all satisfied of the existence of malice.⁷⁴ There are *dicta* to suggest that indulging in competition for the sole purpose of driving the plaintiff out of business,⁷⁵ or maliciously 'preventing a man from obtaining

⁷¹ There has been a noticeable change in the attitude of the American Courts to spite fences. At first they tended to refuse a remedy, but the tide turned with the judgment in *Burke v. Smith* (1888) 69 Mich. 380; 37 N. W. 838, and since then the trend of authority (in those jurisdictions where the matter has not been settled by statute) seems to have been against their legality. The report of *Racich v. Mastrovich* (1937) 273 N. W. 660 (S. D.) contains a photograph of one of these uncouth erections which should be studied by anyone who is satisfied to say that they are legal. But presumably the duty not to erect a spite fence, if it exists, must be subject to a similar limitation to that expressed in the last note but one.

⁷² It is a tort to interfere with a person in his trade or calling by 'unlawful means'. And the phrase 'unlawful means' is not to be read in any narrow sense; it includes all means that the Courts regard as unlawful for this particular purpose, whether they are unlawful for other purposes or not. Thus in *Garret (Garrett) v. Taylor* (1620) Cro. Jac. 567; 2 Rolle Rep. 162, the defendant was held liable for frightening away the plaintiff's workmen and customers by mere threats of mayhem, without (seemingly) any actual assault upon them, and by mere threats of vexatious suits. It is not clear that these threats would have been actionable by the workmen and customers threatened.

⁷³ The words used by the defendant amounted to prophecy, not procurement: see *Quinn v. Leatham* [1901] A. C. at 506-7 (Lord Halsbury L.C.), 533-4, 537-8 (Lord Lindley); Street, Foundations, i, 353; Pollock, Torts, 345.

⁷⁴ *Quinn v. Leatham* [1901] A. C. at 514 (Lord Shand); see also Lord Brampton at p. 523. Cp. Wilgus, 'The Authority of *Allen v. Flood*' (1902) 1 Mich. L. Rev. 28.

⁷⁵ *E.g. Mogul S.S. Co. v. McGregor, Gow & Co.* [1892] A. C. at 49 (Lord Morris), 52 (Lord Field). *Contra*, Stirling J. in *Ajello v. Worsley* [1898] 1 Ch. 274 at 280, where, however, the plaintiffs failed to prove malice. In the celebrated Minnesota case of *Tuttle v. Buck* (1909) 107 Minn. 145; 119 N. W. 146; 131 Am. St. Rep. 446; 22 L. R. A. (N.S.) 599; 16 Ann. Cas. 807, where a banker opened a barber shop for the sole purpose of driving the plaintiff out of the business, it was held that the plaintiff had an action. Commenting upon the headnote to *Allen v. Flood*, the Court quoted from an earlier case the following apt criticism: 'If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable

or holding employment in his calling',⁷⁶ is actionable. In the United States, at all events, it is coming to be settled that it is a tort maliciously to prevent the plaintiff from contracting with a third party, or maliciously to induce a third party lawfully to terminate his contract with the plaintiff.⁷⁷ And it may be that judges on the other side of the Atlantic will soon go even farther than this, for a recent American writer concludes that 'the judicial stage is set for full recognition of the tort right to be free from fraudulent interference with potential testamentary benefits'. 'By analogy', he adds, 'a like right should exist in case of potential donative benefits not testamentary.'⁷⁸ There is nothing in the American cases, so far as they have yet gone, to suggest that such rules are in any way unworkable.⁷⁹

motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate.' Cp. *Dunshee v. Standard Oil Co.* (1911) 152 Iowa 618; 132 N. W. 371.

⁷⁶ *Per* Romer, L.J. in *Giblan v. National, etc. Union* [1903] 2 K. B. 600 at 619-20; cp. *per* Viscount Cave L.C. in *Sorrell v. Smith* [1925] A. C. 700 at 712-14.

⁷⁷ Ames (1905) 18 Harv. L. Rev. at 418-20; 5. W. Huffcut, *ibid.* at 423-43; *Lewis v. Bloede* (1912) 202 Fed. 7; *Carnes v. St. Paul Union Stockyards Co.* (1925) 205 N. W. 630 (Minn.), noted in 10 Minn. L. Rev. 448 (where the burden of disproof of malice was thrust upon the defendant); Carpenter, 'Interference with Contract Relations' (1928) 41 Harv. L. Rev. 742-5, 754-62; Grismore, 'Are Unfair Methods of Competition Actionable?' (1935) 33 Mich. L. Rev. 321; (1936) 36 Col. L. Rev. 849. Cp. as to malicious interference with social relations (1927) 40 Harv. L. Rev. 1022.

It is clear that there is nothing in cold logic to hinder the rule that ethics would suggest. Professor Huffcut, *loc. cit.* at 425, thought that 'if logic were to prevail, we might be forced to the conclusion that intercepting by lawful means the expectation of forming contracts is non-actionable'. Logic would lead to no such result. The fact that A has not yet a contractual right against X does not logically mean that he may not have a tort right against B not maliciously to interfere with the expectation of a contractual right.

⁷⁸ (1937) 35 Mich. L. Rev. 1035, commenting upon *Bohannon v. Wachovia Bank and Trust Co.* (1936) 210 N. C. 679; 188 S. E. 390. In both this case and *Lewis v. Corbin* (1907) 195 Mass. 520; 81 N. E. 248; 122 Am. St. Rep. 261, the testator was deliberately misled by the defendant, but the plaintiff would have had no action for the specific tort of deceit, at least as that tort is understood in this country, because he was not intended to act on the representations. There is not yet any authority in the United States for imposing liability if the testator was not deceived. See also, on the general question, Terry, *Leading Principles of A.-A. Law* (1884) 343-53; Huffcut in (1905) 18 Harv. L. Rev. at 425; Odgers, *Libel*, 6th ed. 91-2; Clerk and Lindsell, 9th ed. 123-4; (1935) 48 Harv. L. Rev. 984 (where it is pointed out that the plaintiff should be given only the pecuniary value of the *expectancy*); (1937) 35 Mich. L. Rev. 348-9. The objection of Cave J. in *Allen v. Flood* [1898] A. C. at 36, that 'there is no such recognized trade or profession as that of a legacy hunter', is rather jejune.

⁷⁹ In accumulating these arguments against the *dicta* in *Pickles's Case* I am more royalist than the King, for both Sir Frederick Pollock and Professor Winfield, whose theory seems to demand a courageous rejection of these *dicta*, seem to accept them. Pollock tried to fit them into his theory by an adroit use of the conception of common right'. Professor Winfield is brought to the reluctant conclusion that 'with us there is nothing to prevent a man from . . . indulging

Some day, therefore, even we in this country may find ourselves able to punish churlish conduct of this sort. Yet the liability, when achieved, will rest upon something more than the mere intentional infliction of damage; it will rest upon the presence of bad faith. Even those Continental systems that profess to have a general theory of liability do not really do more than this.

What is the result of this analysis? I think it may be put like this. The first school has shown that the rules of liability are very wide. The second school has shown that some rules of absence of liability are also very wide. Neither school has shown that there is any general rule, whether of liability or of non-liability, to cover novel cases that have not yet received the attention of the Courts. In a case of first impression—that is, a case that falls under no established rule or that falls equally under two conflicting rules—there is no ultimate principle directing the Court to find for one party or the other. The novelty of the case is not conclusive in favour of either. Hence the Court is here at liberty to decide, and does decide, on reasons that are extra-legal.

Salmond's formulation of the issue fails, then, to make allowance for a middle view. Why should we not settle the argument by saying simply that there are some general rules creating liability (recognizing the plaintiff's interest, conferring upon him a right not to be damaged), and some equally general rules exempting from liability (refusing to recognize the plaintiff's interest, or recognizing a conflicting interest in the defendant, and thus conferring a privilege upon the defendant to cause damage)? Between the two is a stretch of disputed territory, with the Courts as an unbiased boundary commission. If, in an unprovided case, the decision passes for the plaintiff, it will be not because of a general theory of liability but because the Court feels that here is a case in which existing principles of liability may properly be extended. ✓ ± ?

To make this picture complete, a conclusion that we arrived at in the first part of the paper must be repeated. The present heads of liability, and of non-liability, are not fixed and

in any . . . act of senseless spleen or prodigality which does not happen to fall within some definite tort or crime' (Text-Book, 69)—a sentence in which Sir John Salmond might have heartily concurred. If the general theory of liability is to be forsaken in this, its narrowest possible application, I do not myself see how it is to be maintained in any application. But both these learned writers seem to agree that the law ought to stand otherwise: Pollock, Torts, 337; Winfield, Text-Book, 69—70; cp. Allen, *Legal Duties* (1931) 95; Goodhart, *Essays in Jurisprudence and the Common Law* (1937) 36—7.

immutable. The Courts, in performing their functions, assume to themselves certain revisionist powers, and it must be said that those powers are usually exercised so as to expand the area of liability. But there is no comprehensive theory of liability; there is simply a wide and expansible theory.

PAUL COLLINET.

JEAN JOSEPH POL COLLINET (whom we knew as Paul Collinet) died suddenly on December 9, 1938, at the age of sixty-nine, on the eve of his retirement, his tenure of his chair having been extended, by reason of his eminence, beyond the age limit prescribed by the règlement. His main work was in Roman Law, both at Lille, where he began his professorial career, and at Paris, where he was appointed Professor of Roman Law in 1919. But he taught other matters, and a bibliography of his numerous writings would show not only how much work he did, but also how wide were his intellectual interests. In early life he contributed to Celtic studies, under the influence of d'Arbois de Jubainville. He did notable work, too, on the history of the Ardennes, where he was born, and on that of the Artois, where he first taught. In papyrology also he made his mark. But the chief work of his later life was on the law of the Eastern Empire, and, especially, of its Procedure; it is by this that he will be, and probably would have preferred to be, chiefly remembered.

All this was done under a severe handicap, for his health was never good. In academic circles at Lille he met Mlle. Guérin, whom he married, and who survives him. It is not too much to say that to her constant care we owe the preservation for thirty years of a life held on exceptionally precarious tenure, and to her intellectual sympathy the ardour and courage with which Collinet worked under the handicap of frequently recurring illness.

He was a born Professor, but he was more than a Professor. When his work at Lille was ended by the German occupation, he threw himself into the very practical and onerous work of the revictualling of the occupied areas, a work which earned for him the Cross of the Legion of Honour. This readiness to help was only an expression of his most salient characteristic, his friendliness—there were no unkind words in his vocabulary. No one worked harder than he, by addresses to assemblies in many places, under the auspices of the Association 'France Britannique', and in other ways, to foster good relations between his country and ours. This friendliness made him a welcome figure at Congresses, and he loved Congresses. It

was natural, therefore, that he should be frequently chosen for missions of various kinds to foreign countries, from which he returned laden with honours. He often visited Cambridge and of course made friends—he could not help it. Two years ago he came as a visiting Professor and gave us two lectures on Roman National Law and *Ius Gentium*. It was characteristic of the man that, within a minute after he began his first lecture, he was on intimate terms with his audience, whom he kept interested and amused throughout his lectures, lectures which, nevertheless, were dealing, and dealing wisely, with very difficult problems. His last visit to us was in July of last year, when he attended the annual meeting of the Society of Public Teachers of Law, to which he belonged as one of the small but distinguished body of Honorary Members. It was a delight to him to meet again friends from all over the country, but it was to be for the last time.

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THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

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NOTES ON RECENT CASES.

CONFLICT OF LAWS—WILL—SETTLEMENT—WILL IN FRENCH FORM—WILLS ACT, 1861, s. 1—WILL EFFECTIVE AS REGARDS PERSONAL ESTATE—INOPERATIVE TO PASS INVESTED PROCEEDS OF SALE OF SETTLED REALTY—SETTLED LAND ACT, 1925, s. 75 (5).

Re Cartwright, Cartwright v. Smith. [1939] 1 Ch. 90.

C., a BRITISH subject domiciled in England, made a will in France in accordance with French law but not in the manner required by the Wills Act, 1837. This will was admitted to probate in England under the Wills Act, 1861 (Lord Kingsdown's Act), s. 1, which validates, as regards personal estate, the execution of a will made out of the United Kingdom by a British subject if the will complies with the law of the place where it was made. At the time of his death the testator was absolutely entitled, subject to certain charges, to invested proceeds of the sale of freehold property comprised in a strict settlement. The trustee of the settlement had retained the investments to meet the charges mentioned and the question was whether these investments were to be regarded, for the purposes of Lord Kingsdown's Act, as personal estate or whether they were notionally converted into realty by the Settled Land Act, 1925, s. 75 (5). This sub-section provides that securities on which an investment of capital money is made 'shall for all purposes of disposition, transmission and devolution be treated as land'.

The Court of Appeal adopted towards section 75 (5) the view which it had taken of the effect of the similar, but not identical, section 22 (5) of the Settled Land Act, 1882, in *Re Twopeny's Settlement* [1924] 1 Ch. 522. The Court reversed Bennett J. and held the French will inoperative to pass the investments. Sir Wilfrid Greene M.R., with whose judgment Scott and Clauson L.JJ. agreed, said that section 75 (5) preserved the legal character of settled land notwithstanding its actual conversion into capital money, as would an express trust for re-investment in land of capital money.

The sub-section uses the word 'land', which includes leaseholds, but the investments were nevertheless held to be converted into realty by giving effect to the word in relation to the particular facts of the case: the invested proceeds of the sale of freehold land were to be treated as freehold land for all purposes of disposition, transmission and devolution. An attempt was made to argue that this conversion was confined to devolution under the settlement and not *dehors* the settlement, but the Court regarded such an argument as unsupportable because the sub-section would have nothing to operate upon if the property had ceased to be subject to the settlement, which was not the position in the present case. A submission that the testator had elected to take the investments in their unconverted state was not sustained because, assuming the testator were entitled to elect, the only substantial evidence of election—the language of the French will—was inadmissible, as the will being valid in this country only for

the purpose of passing personal estate could not include property which apart from its words would be real estate.

Bennett J. had decided that section 75 (5) did not effect a conversion because the alteration of the law of devolution of realty on intestacy by the Administration of Estates Act, 1925, prevented the sub-section from operating to change the course of devolution of personal estate, which was, according to the learned judge, the basis of the opinions expressed in *Re Twopeny's Settlement* (*supra*) on section 22 (5) of the Act of 1882. Sir Wilfrid Greene said that this view was based upon a misapprehension of the effect of the Administration of Estates Act, which, far from abolishing the distinction between realty and personalty for any purpose, merely provided for devolution of realty on intestacy to persons different from those entitled under the law previously in force.

As the word 'land' in section 75 (5) has to be construed in relation to the facts of each case, it is submitted that the decision would have been different if the investments in the present case had been purchased with the proceeds of the sale of settled leaseholds: see *Re Grassi* [1905] 1 Ch. 584.

M. E. B.

CONSTITUTIONAL LAW—COLONY ACQUIRED BY VOLUNTARY CESSION—GRANT OF REPRESENTATIVE INSTITUTIONS TO COLONY BY LETTERS PATENT—CROWN'S PREROGATIVE TO LEGISLATE THEREAFTER HELD TO BE RESERVED.

Sammut v. Strickland. [1938] A. C. 678.

THIS case arose out of a claim by X, the respondent, for a refund of 3s. 9d. paid under protest as duty on articles imported into Malta, on the ground that it had been exacted under an invalid Ordinance. The Court of first instance in Malta decided against her, but this was reversed by the Malta Court of Appeal, and Y, the customs official, appealed to the Judicial Committee of the Privy Council.

In 1921 Malta was given by letters patent representative assemblies with power to legislate on local matters, more important affairs of Imperial interest being reserved to the Crown. One of the provisions of the Malta (Letters Patent) Act, 1936, was that the letters patent of 1921 were to be considered revocable. Accordingly by a new set of letters patent dated August 12, 1936, they were revoked, and the Governor was given power to make laws 'for the peace, order and good government of Malta', under which provision there was enacted the Temporary Additional Duties Ordinance No. 27 of 1936, whose validity was now disputed.

X claimed, first, that as Malta was acquired by the British Crown by voluntary cession and the will of the inhabitants, and not by conquest or forcible cession, the Crown never had a prerogative right to legislate. The Lord Chancellor in delivering their Lordships' opinion denied that any distinction could be drawn for this purpose between territory acquired by voluntary cession and territory acquired by other forms of cession. In any event, the Common Law doctrine, which laid down that the Crown's prerogative right to legislate for territories acquired by conquest or cession had no existence where territory was acquired by settlement, was founded

upon the view that settlers of British nationality took their own law with them, and this could have no application to Malta.

Alternatively it was argued on the authority of *Campbell v. Hall* (1774) 1 Cowp. 204 that the effect of the grant of representative institutions in 1921 was to extinguish the Crown's prerogative power to legislate except in matters where it was specifically reserved, and that no revocation of the letters patent making the original grant could revive this power in the Crown. On this point it was held that the rule in *Campbell v. Hall* was that where there had been a grant of representative institutions and a concurrent power to legislate had not been reserved there could be no legislation while those institutions continued to exist. In the present case there was no attempt at concurrent legislation in matters which were not specifically reserved for it was not disputed that the grants made by the letters patent of 1921 had been lawfully revoked, and hence this case could not be brought under the rule. With regard to the contention that it was usual in instruments granting representative institutions to reserve to the Crown power to legislate as if the grant had not been made, and that if this reservation was not inserted the power ceased to exist except where it was reserved on special matters, their Lordships believed that this also applied to concurrent legislation and had no relevance when the grant had been validly revoked. Hence the letters patent of August 12, 1936, were valid, the Ordinance made under them was enforceable, and their Lordships advised that the appeal should be allowed.

The attempt to place territory acquired by voluntary cession on a special footing is supported by little direct authority. The second point, however, as was remarked in the case, is not one which has been considered in the text-books, and such statements as that in Keir and Lawson, *Cases in Constitutional Law*, p. 408, 'once a legislature has been granted to a conquered colony, the power of the Crown to legislate by prerogative is irrevocably taken away', must now be read to mean that this is so only during the existence of the colonial Legislature.

R. R. P.

CONTRACT—FRUSTRATION—LONG INTERRUPTION OF PERFORMANCE OF CONTRACT, WHICH IN EFFECT MAKES IT A DIFFERENT CONTRACT—EVENT CAUSING DESTRUCTION IN CONTEMPLATION OF PARTIES—CONTRACT VOID FOR FRUSTRATION.

W. J. Tatem, Ltd. v. Gamboa. [1939] 1 K. B. 132.

THE Spanish Republican Government, acting through its agent Gamboa, chartered the S.S. *Molton* from the plaintiffs for thirty days commencing July 1, 1937, for carrying refugees from North Spain to French Bay ports. On July 14 the *Molton* was seized by a Nationalist ship and taken to Bilbao. She was kept there in custody until September 7, when she was released and proceeded to Bordeaux, where she was re-delivered to the owners on September 11. The hire rate of £250 a day was paid for a month in advance, and the owners now claimed hire for the period from August 1 to September 11, as it was stipulated in the charterparty that the £250 a day should be paid until the ship was re-delivered to the owners. The defendant denied liability on the ground that the adventure had been frustrated by seizure of the ship.

Goddard J. gave judgment for the defendant. It was strongly argued on behalf of the plaintiffs that the parties were well aware of the possibility of the ship being seized, witness the high rate of hire. As, however, they made no provision for such an eventuality, they must be presumed to have intended the contract to stand even if the ship was seized. In reply to this argument, the learned judge said (at p. 135) that he was unable to hold on the evidence that the parties could have contemplated seizure and detention for such a time after the charter had expired. Nevertheless, as this argument in no way affected the applicability of the doctrine of frustration, he would give judgment on the assumption that the parties had contemplated that the ship might be seized and detained as she was.

The learned judge was of opinion that the doctrine of supervening impossibility depended on the disappearance of the subject-matter without regard to the intention of the parties. For support of this view he looked to Lord Haldane's dissenting speech in *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Products Co. Ltd.* [1916] A. C. 397, as approved in several later cases. Lord Haldane declared that an event may be so sweeping in character and extent that 'the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with the foundation'. If this be the true view of the doctrine, then it makes no difference whether the parties contemplated such an event or not. The phrase 'unforeseen circumstances' when used in this connexion simply means that they were circumstances for which the contract made no provision. Cases in point are those which deal with the doctrine in relation to requisitioning ships. In *Bank Line, Ltd. v. Capel & Co.* [1919] A. C. 435 the charterparty actually provided for requisition. It provided that charterers were to have the option of cancelling the charterparty. Nevertheless, the House of Lords held that it did not prevent the doctrine applying. Goddard J. said that here 'the parties must have had before them the possibility . . . of requisition every bit as much as the parties had of seizure in this case' (pp. 139—140).

The judgment rejects the theory that frustration could take effect only by the implication of a term that the contract should terminate if a certain state of facts ceased to exist. Abundant authority can be found for this theory, but it seems to have been discarded in favour of a general theory of frustration. It is submitted that the change represents the adoption by the Courts of a more reasonable attitude towards commercial contracts—preferring a reasonable interpretation rather than a strict one. Nevertheless, it is perhaps unfortunate that all the authorities cited, with one exception (the *Capel Case*, *supra*), were not concerned with the intention of the parties but with deciding whether a particular contingency came within the scope of the doctrine of frustration. Even in the single exception, the effect of the application of the doctrine was to execute the intention of the parties rather than to defeat the apparent intention as in the present case.

It seems clear that in future only an express term against termination of the contract will prevent the Courts applying the doctrine of frustration if the subject-matter is destroyed or otherwise made unavailable.

W. L. J.

CONTRACT—ILLEGALITY—CHEQUE GIVEN FOR GAMBLING DEBT DISHONoured
—NEW PROMISE BY DEBTOR TO PAY PROVIDED CREDITOR REFRAINED
FROM SUING HIM—HELD, NO CONSIDERATION FOR PROMISE.

Poteliakhoff v. Teakle. [1938] 2 K. B. 816.

T. GAVE P. a cheque for a gambling debt owed by T. to P. The cheque was dishonoured. Threatened with an action by P., the publicity of which he was anxious to avoid, T. promised to pay the sum in monthly instalments within a year. In consideration of this promise P. promised not to sue on the original debt. T. subsequently made default on the instalments, and P. brought this action on the promise to pay them.

The county court judge gave judgment for P., holding that the forbearance to bring the action, with its attendant publicity, was sufficient consideration to support the promise of T. P.'s action on the original debt would not necessarily have failed, as T. might not have pleaded the Gaming Act, 1845. P. gave in evidence that honest people did not plead the Gaming Act.

The Court of Appeal unanimously reversed this decision. Greer L.J. pointed out that P. knew that her claim was unenforceable, owing to the Gaming Act, whatever her expectations of T.'s 'honesty' might be. It could therefore be no consideration to support the alleged contract. Nor was the publicity of an action the same as the publicity threatened in *Hyams v. Stuart King* [1908] 2 K. B. 696, viz. posting the defaulter at Tattersalls. For the latter cause of action was something quite apart from the suit on the unenforceable contract. As authority for this were cited the words of Sir G. Barnes P. (*ibid.* at p. 703), referring to *Goodson v. Baker* (1908) 98 L. T. 415, that 'there was nothing to shew anything more than an agreement not to sue for a time', and his opinion that some further forbearance from actions detrimental to the debtor was requisite. Thus the Court refused to allow that the undesired publicity of a lawsuit might constitute such additional detriment, and be taken into separate account as consideration.

Against this it might be urged that the President was not considering the possibility of the additional detriment existing within the action itself. But is it not easy to imagine cases, such as the present, where the publicity of a lawsuit may be just as detrimental to the defendant as being posted as a defaulter by his association? Forbearance to inflict such publicity would then seem a very real consideration, and of necessity to fall within *Hyams v. Stuart King*.

Slesser L.J., though reiterating this distinction between the exposure of the defendant in and out of Court, and basing his decision upon it, also cited a very relevant passage from *Wade v. Simeon* (1846) 2 C. B. 548, 564 (*per Tindal C.J.*): 'It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action.' Does this not indicate a more acceptable *ratio decidendi* for the present case, in that the prosecution of a claim known to have no foundation in law is contrary to public policy? In any case, all lawyers will sympathize with the reluctance of the bench to extend the rule in *Hyams v. Stuart King*.

H. W. R. W.

CONTRACT—ILLEGALITY—PUBLIC POLICY—LIFE INSURANCE—SUICIDE OF INSURED WHILE SANE—ADMINISTRATRIX HELD NOT ENTITLED TO RECOVER POLICY MONEY.

Beresford v. Royal Insurance Co. Ltd. [1938] A. C. 586.

IN 1925 R. took out a number of policies on his own life with the X Co. for the sum of £50,000. Each policy contained a condition that if the assured took his own life, whether sane or insane, within one year from the commencement of the assurance, the policy should then be void as against any person claiming the policy money. In 1934, a premium having become due which R. was unable to pay, he obtained extensions of the time for payment, the last of which ended at 3 p.m. on August 3, 1934. A few minutes before that hour the assured while sane shot himself. B., his administratrix, claimed the amount of the insurance from X Co. The House of Lords unanimously held that the claim was bad. Swift J. had given judgment for B. The Court of Appeal reversed this decision, and held that the personal representative of a person, who, having insured his life, commits suicide while sane, cannot recover the policy moneys, as it would be contrary to public policy to assist the personal representative to recover the fruits of the crime committed by the assured.

The House of Lords affirmed the Court of Appeal. Lord Atkin found that on the proper construction of the contract the insurance company promised R. that if he, in full possession of his senses, intentionally killed himself after the expiration of one year from the commencement of the assurance, they would pay his executors or assigns the sum assured. But in his opinion such a contract was not enforceable in a Court of law; the principle involved had been applied in *Moore v. Woolsey* (1854) 4 E. & B. 243, *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147 and *Hall v. Knight and Baxter* [1914] P. 1, and might be stated thus—‘a man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether under a contract or a gift’ (p. 598).

In the present case the assured had feloniously killed himself; and the principle applied equally where the criminal was dead and his personal representative was seeking to recover a benefit which only takes shape after his death; for ‘I cannot think the principle of public policy to be so narrow as not to include the increase of the criminal’s estate amongst the benefits which he is deprived of by his crime’ (p. 599).

Lord Atkin (at pp. 600—601) mentioned the decision in the United States’ case of *Northwestern Mutual Life Assurance Co. v. Johnson* (1920) 254 U. S. 96, in which the plaintiff recovered on facts similar to the present case. He pointed out that it contained no discussion of the rule of public policy that could be applied except that the promise to pay may evoke a possible motive for self-slaughter; but the principle of public policy which he was applying went far beyond this supposed motive, and was sufficient to render the contract, in the circumstances, unenforceable.

Lord Macmillan pointed out (at p. 604) that there was ‘a conflict of principles of public policy involved, for it is undeniably a principle of public policy that persons who enter into contractual engagements should be required to fulfil them’. Nevertheless, since ‘no criminal can be allowed to benefit in any way by his crime’ (p. 605) he agreed that the contract was unenforceable.

The decision on grounds of public policy in this case may be contrasted with that in *Fender v. St. John-Mildmay* [1938] A. C. 1, where it was held by the House that a promise made by one spouse, after a decree *nisi* for the dissolution of the marriage has been pronounced, to marry a third person after the decree has been made absolute is not void as being against public policy.

A. Y. E.

CONTRACT—RESTRAINT OF TRADE—HELD, IMPLIED TERM OF CONTRACT THAT INVENTION OR DISCOVERY BY EMPLOYEE IN COURSE OF EMPLOYMENT BECOMES PROPERTY OF EMPLOYER.

Triplex Safety Glass Co. v. Scorah. [1938] Ch. 211.

IN 1929 S. entered into a written contract of employment with T. Co., the plaintiffs, makers of motor safety glass. This agreement provided *inter alia* that S. should use his best efforts to keep himself informed of all the latest information pertaining to the manufacture of safety glass, and that such knowledge and information should become the exclusive property of T. Co.

In 1932 S. discovered a new method of producing acrylic acid, in the course of his employment and using the company's materials. He communicated this discovery to them and they took no steps to patent it or to employ it in their manufacture of safety glass.

In 1934 S. left T. Co. and set up as a maker of laboratory glass, using his discovery in its manufacture. In 1935 he took out a patent to protect his 1932 discovery and the patent was granted. T. Co. subsequently attempted to patent the discovery, but learned that a grant had already been made to the defendant. T. Co. asked S. to assign the patent to them and S. refused.

Farwell J. stated that every contract made between an employer and employee which was in restraint of trade was illegal as against public policy. Moreover the law would not permit an employer to prevent an employee from using knowledge or experience he had acquired while in the employment of the employer. Such knowledge or skill was in no sense the property of the employer. For these reasons the clauses in this express contract were too wide and unreasonable and were unenforceable, for they would have prevented S. indefinitely from making use of his knowledge.

But the learned judge went on to consider how far implied terms of employment would apply. Apart from any express covenants it was a general term of employment that discoveries made by the employee in the course of employment, and with the materials of the employer, were the property of the employer and not the employee. The employee in such a case became trustee of the discovery for the employer and was bound to give the benefit of any such discovery to the employer, 'and in my judgment that applies in this case notwithstanding the express contract is not enforceable' (p. 217).

Further, once a person was put into the position of a trustee, he could not avoid the obligations attached thereto—he was bound unless

the beneficiaries released him expressly or impliedly. Therefore, though nothing had been done in the matter by the company for two years, yet S. had never ceased to be a trustee. Therefore when the beneficiary called upon him to assign the property he was bound to do so. This was subject, however, to the beneficiary paying the cost of transfer—for a trustee was not bound to spend money on the property of another.

This decision is both illogical and unjust for the effect of it is that the Court will imply into the wreck of an illegal contract those very prohibitions which have rendered it unenforceable.

R. A. P.

CONTRACT—WRITING REQUIRED BY LAW OF PROPERTY ACT, s. 40—PART PERFORMANCE OF ORAL CONTRACT—PURCHASER IN POSSESSION AS TENANT—EXPENDITURE ON PROPERTY—ACTS NECESSARILY REFERABLE TO CONTRACT—LAW OF PROPERTY ACT, 1925 (15 GEO. 5, c. 20), s. 40.

Broughton v. Snook. [1938] Ch. 505.

IN April 1935 B. orally agreed with S. to purchase a freehold inn. The sale was not to be completed until December 31, 1936, and in the meantime the tenant then in possession was not to be disturbed. However, in October 1936 by arrangement with the tenant B. went into possession of the inn, and in doing this he had the consent of S. B. proceeded to make considerable alterations and improvements in the inn, expending nearly £200. S. saw and assented to these alterations. In March 1937 S. died, and his executors offered the inn for sale. B. thereupon claimed specific performance of the oral agreement. The defendants pleaded section 40 of the Law of Property Act, 1925, which requires a contract for the sale of land to be in writing in order to be actionable.

Farwell J. granted the order for specific performance, on the ground that there had been sufficient acts of part performance. It was necessary that the acts relied on should 'be such as not only to be referable to a contract such as that alleged, but to be referable to no other title'. (Farwell J. (at p. 512) cited these words from Fry on Specific Performance, 6th ed. p. 276, and once again they receive judicial approval.) The peculiar feature of the case was that when the plaintiff went into occupation of the inn it was not in the seller's possession. It had been suggested by counsel for the defence that the facts relied on might refer to a tenancy, and not to the contract, for there was a tenant already in possession. But the learned judge (at p. 515) held that it was 'almost fantastic' to suppose that S., who had a flourishing business in Sheffield, and a large experience in the licensing trade, would have moved into a small inn, and spent quite a considerable amount of money on the premises, if he had contemplated the possibility of being evicted at the end of the year; and if an ingenious mind might suggest such an explanation, that did not mean that the facts were not to be held as being 'necessarily referable to the contract', and that the only reasonable explanation should not be recognized.

The peculiar facts of this case thus occasioned judicial interpretation of the recognized phrase: 'necessarily referable to the contract'.

It had been suggested by counsel for the defence that when a plaintiff sought to establish the second circumstance required by Fry L.J., namely,

that the acts of part performance relied on were 'such as to render it a fraud in the defendant to take advantage of the contract not being in writing', he (the plaintiff) must prove affirmatively that there was nothing to prevent the contract being enforceable, *e.g.* that there was no undervaluing, or no mental disability. But the learned judge declared that if the defendant seeks to rely on fraud, as evidenced by such circumstances as undervaluing or mental disability, those are things which the defendant must plead specifically and must prove, and that it is not for the plaintiff to prove a negative. In this case no such defence was pleaded, so these remarks of the judge have no greater quality than *dicta*.

P. B. H.

CRIMINAL LAW—DEMANDING MONEY WITH MENACES WITH INTENT TO STEAL THE SAME—'STEAL'—CLAIM OF RIGHT MADE IN GOOD FAITH—CLAIM UNFOUNDED IN LAW—CONVICTION QUASHED—LARCENY ACT, 1916, ss. 1 (1), 30.

R. v. Bernhard. [1938] 2 K. B. 264.

B. HAD been the mistress of A. When immoral relations had ceased, she told A. that she had lost her money, and requested his aid. A. agreed to pay her £20 per month for one year, and paid £80 to cover the first four months. According to her evidence, she believed she was to receive the remaining £160 at the end of those four months. When that time arrived she went to A.; but he refused to pay. She threatened to expose him to his wife and to the public.

She was convicted before Lord Hewart C.J. of demanding money with menaces of A. with intent to steal the same, contrary to the Larceny Act, 1916, s. 30. The Court of Criminal Appeal quashed the conviction.

It was urged that the trial judge had misdirected the jury as to the meaning of the words 'without a claim of right made in good faith' contained in the definition of stealing in the Larceny Act, 1916, s. 1 (1), and that he had failed to leave to the jury for their decision whether she had made the demand 'fraudulently and without a claim of right made in good faith'.

The Court agreed with Lord Hewart that the words 'with intent to steal' in section 30 must be construed with reference to the definition of stealing in section 1 (1); but the Court disagreed with Lord Hewart as to the true meaning of the words 'fraudulently and without a claim of right made in good faith'.

A whole series of decisions (many before, and at least one subsequent to the Act) bound the Court to hold that a person has a claim of right within the meaning of section 1 (1) if he is honestly asserting what he believes to be a lawful claim, *even though it may be unfounded in law or in fact*.

The Court found the agreement between A. and B. was not founded on an illegal consideration, though, not being under seal, it was void for want of consideration. The Court also found that there was sufficient evidence to justify a jury in finding that B. honestly believed she had a claim of right.

We may note that the definition of Theft in the Act is an enactment declaratory of the Common Law. The earlier authorities dealing with the

question of 'a claim of right made in good faith' are therefore relevant; it is not a pure question of the construction of the words of a statute.

We may also note the alertness of that single jurymen who took some time to be convinced by the Lord Chief Justice that 'a claim of right' *must* be founded in law.

C. K. C.

CRIMINAL LAW—EVIDENCE—FALSE PRETENCES—SYSTEM—MONEY OBTAINED ON EARLIER OCCASION BY DIFFERENT PRETENCE—EVIDENCE OF EARLIER TRANSACTION HELD INADMISSIBLE.

R. v. Slender. (1938) 26 Cr. App. R. 155.

S., the appellant, and another man were convicted of having obtained money by false pretences from Mrs. Sampson, the false pretence being that they had come from Colesbourne, that they were obliged to spend the night in Cheltenham, and needed money for their expenses. Evidence was admitted that, two days previously, they had visited Mr. Price, who lived on the outskirts of Cheltenham, and had obtained money from him by the story that they wanted to go to a neighbouring aerodrome where they had work, and required money for the journey, and it was proved that, on that occasion, S. had given a false name. The evidence was admitted on the ground that it tended to prove an intent to defraud. The Court of Criminal Appeal quashed the conviction.

Humphreys J. in giving judgment said that the case itself was very clear, and apparently quite conclusive. Mrs. Sampson had made it quite plain that it was because of the false pretence that she had parted with her money—namely, that the men were 'stranded' in Cheltenham after an accident in Colesbourne. This the prosecution had proved to be false. The question might well have been left to the jury, whether they had obtained money by these false statements with intent to defraud, but, presumably to strengthen their case, the prosecution called Price. If, on a charge of obtaining money by false pretences, evidence is to be called relating to some other offence which is not charged in the indictment, that evidence can be given only within clearly defined limits. The leading case on these limits is *R. v. Fisher*, 3 Cr. App. R. 176; [1910] 1 K. B. 149. Channell J. there said that the principle was clear that the prosecution may not prove an offence by general evidence as to bad character. If, however, the evidence of other offences does go to prove that he committed the offence charged (*e.g.* by proving a 'system of fraud'), it is admissible, although it proves he committed another offence. He explained 'system' thus (at p. 153): 'If all cases had been frauds of a similar character, showing a systematic course of swindling by the same method, then the evidence would have been admissible.'

The Court held that the evidence of Price was entirely inadmissible on a charge of obtaining money on the following Monday from Mrs. Sampson by the false pretence alleged in the indictment. The false pretences in the two cases were not the same, and the evidence did not assist the prosecution to prove their case. Apart from Price's evidence, the case would have been clear and simple; but this evidence was inadmissible and highly prejudicial.

The result of the Criminal Appeal Act, 1907, s. 4 (1), is that a conviction can be upheld, despite wrong ruling as to evidence, if the Court sees that the jury without any doubt *must* have come to the same verdict even if the case had been tried in the proper manner. In this case, however, the evidence of Price was so prejudicial, that there must remain an element of doubt as to what the jury would have found if it had not been admitted.

D. E. W.

MORTGAGE—PRINCIPAL TO BE REPAID BY INSTALMENTS OVER PERIOD OF FORTY YEARS AND REDEMPTION PERMISSIBLE ONLY AT END OF THAT PERIOD—HELD, NEITHER A CLOG ON THE EQUITY NOR AN INFRINGEMENT OF THE RULE AGAINST PERPETUITIES.

Knightsbridge Estates Trust, Ltd. v. Byrne. [1938] 4 All E. R. 618.

IN 1931 X, an estate company, borrowed £130,000 from Y, an insurance company, and, as security, mortgaged to Y property consisting of seventy-five houses, eight shops and a block of flats. It was a term of the mortgage that the principal should be repaid by eighty half-yearly instalments spread over a period of forty years. The term for repayment was suggested by X, who now claimed to redeem the mortgaged property after the expiration of six months' notice upon their paying to Y the principal, together with interest and costs.

It was contended by X that (1) a provision that the mortgage should not be redeemed until the expiration of a period of forty years was void as being a clog on the equity of redemption; and that (2) the mortgage deed infringed the rule against perpetuities.

The Court of Appeal reversed *Luxmoore J.* and gave judgment for Y. It was argued by X that the agreement to postpone the contractual right to redeem for forty years was prohibited in equity. The basis of the argument was that a period of postponement must be reasonable, and that reasonableness must be judged by consideration of the mortgage deed itself, without regard to extraneous matters. Sir Wilfrid Greene M.R., delivering the judgment of the Court, said that the Court emphatically declined to consider a question of reasonableness from a standpoint so unreal. To refuse to take into account the business considerations involved in such cases would bring the law into disrepute.

The proposition, he said, that a postponement of the contractual right of redemption was permissible only for a reasonable time was not well founded. Undoubtedly a right of redemption was a necessary element in a mortgage transaction, and where the contractual right to redeem was illusory equity would grant relief by allowing redemption; this was the point of *Fairclough v. Swan Brewery Co. Ltd.* [1912] A. C. 565, where the provision for redemption was so nugatory as to make the mortgage irredeemable. The Master of the Rolls said that equity was concerned to see two things: (1) that the essential requirements of a mortgage transaction were observed, and (2) that oppressive and unconscionable terms were not enforced.

Luxmoore J. had not expressed the opinion that the postponement was to be regarded as void merely by reason of its length. He had held

that the period was, 'having regard to all the provisions of the deed, unreasonable'. The Court was unable to take the view that it was entitled to treat as unreasonable provisions in a mortgage deed entered into by the two parties with the assistance of competent advisers.

The Master of the Rolls said that Luxmoore J. was correct in deciding against the respondents' second contention, that the postponement of redemption for forty years offended the rule against perpetuities. That rule was not of universal application, and had never been applied to mortgages, for they do not produce the mischief which the rule was intended to prevent; in fact, the Legislature had expressly recognized the validity of long-term mortgages in the power to borrow given to local authorities by various Acts of Parliament; for example, the Local Government Act, 1923, s. 198.

In view of the increasing practice of providing for repayment of mortgage loans by instalments, this decision is eminently fair and just. Mortgage to-day is a business transaction of benefit to both parties; and the Courts, recognizing the right of the parties to vary their contractual rights to suit the circumstances, will not interfere unless those circumstances make the terms unfair or oppressive.

H. K. M.

PERSONAL PROPERTY—BEES ARE ANIMALS FERAE NATURAE UNTIL HIVED
—OWNER HAS NO RIGHT TO ENTER ANOTHER'S LAND IN PURSUIT OF
THEM ALTHOUGH THEY REMAIN HIS PROPERTY WHILE IN HIS SIGHT
AND PURSUED BY HIM.

Kearry v. Pattinson. (1939) 55 T. L. R. 300.

SOME of the bees of K., a bee-keeper, swarmed and settled in the garden of P., his neighbour. P. at first refused K.'s request for permission to enter his land in order to rehive them, but after some interval he gave it. K. entered P.'s garden, but found that the bees had flown. He thereupon brought an action against P., claiming that P. had prevented him from entering P.'s land, or alternatively refused to permit him to do so, with the result that his property had been lost, and asking for damages for loss of the bees and of the profit which he would have made on their honey. His claim was based mainly on conversion. The county court judge found as facts that K. had not lost sight of the bees and could identify them, and held therefore that they remained K.'s property. He held, however, that K.'s action failed because P. had committed no actionable wrong in his mere refusal to permit K. to enter his land. He added that had K. lost the bees through P.'s active interference with them, he could have recovered. K. appealed.

The Court of Appeal, though disagreeing with the reasons given by the county court judge, upheld his judgment.

Slessor L.J., in giving judgment for P., said that, as bees were, till hived, animals *ferae naturae*, once they had escaped from their owner they would, according to Blackstone's well-known test, remain his property only so long as they were within his sight and he had the power to pursue them. 'Power to pursue' he interpreted as meaning lawful power to pursue; and, despite *Gedge v. Minne* (1613) 2 Bulst. 60 (which he distinguished) and other cases quoted by counsel for K., there was no

authority for the view that a man might follow bees into another man's land to rehive them. Once, therefore, they had settled in P.'s land, K. ceased to own the bees and they became once more *ferae naturae*. Therefore P. could not convert them.

Goddard L.J. based his judgment on slightly different grounds. The pursuit of bees, or of any other animal *ferae naturae*, could not justify a trespass. Hence one cannot demand entry to recover one's escaped animals *ferae naturae* (or, according to Bullen and Leake, 3rd ed., any other property). Therefore P. did nothing unlawful in refusing permission and so could not be liable. He added, in criticism of the judgment of the county court judge, that, K. having lost his ownership of the bees, P., just as much as K., or indeed any other trespasser, could have gained ownership of the bees by hiving them. Interference with them by P., therefore, would not have rendered him liable.

There are several points of interest in the judgments and *dicta* of the Court of Appeal. In the first place the case clearly establishes that bees are animals *ferae naturae*.

Secondly it is interesting to note the different principles on which Slessor and Goddard L.J.J. reach the same decision. Their arguments, coinciding in the view that it would have been trespass for K. to enter P.'s land in order to reach his bees, thereafter diverge in reaching their respective conclusions. Slessor L.J. deduced from this premiss that, as K. had not (lawful) power to pursue the bees, they were no longer his, so that P. could not commit conversion of them. Goddard L.J. held that as K. could not lawfully enter P.'s land to recover the bees, therefore P.'s refusal to give him permission to do so was perfectly legal and could not render P. liable. There seems to be no great importance in this distinction.

S. C. S.

REAL PROPERTY—RESTRICTIVE COVENANT—EXPRESSED TO BENEFIT UNSOLD
PART OR PARTS OF ESTATE—BENEFICIAL TO SMALL PORTION ONLY—
ENFORCEABILITY.

Marquess of Zetland v. Driver. [1939] 1 Ch. 1.

IN 1928 Z., tenant for life of settled land, conveyed in fee simple No. 200 Lord Street, Redcar (part of the settled land) to G., who later sold to Driver. By the conveyance, G. entered into a covenant with Z. declared to be intended 'to benefit and protect such part or parts of the lands in Redcar, now subject to the settlement, (a) as shall for the time being remain unsold, or (b) as shall be sold by the vendor or his successors in title with the express benefit of the covenant'. The covenant provided that 'no act or thing shall be done or permitted [on the premises] which in the opinion of the vendor may be a public or a private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood'. The term 'vendor' was to include where the context admitted his successors in title. Certain parts of the unsold land were contiguous to No. 200 Lord Street and others were over a mile away. In 1929, on the death of Z., the plaintiff, X, succeeded to the unsold part of the settled land. In 1936 Driver began

using the premises as a fried fish shop. X, being of opinion that this user was detrimental to the amenities of the neighbourhood and his own property, brought this action for an injunction against Driver.

The Court of Appeal held, reversing the decision of Bennett J., that as the covenant was, in effect, expressed to be for the benefit of the whole or any part or parts of the unsold settled property, and not merely for the benefit of the whole land without qualification, *Re Ballard's Conveyance* [1937] Ch. 473 was no authority against the enforceability of the covenant, and an injunction was granted.

Farwell J., reading the judgment of the Court, repeated (at p. 7) the threefold division of restrictive covenants made by Farwell J. (the learned judge's father) in *Osborne v. Bradley* [1903] 2 Ch. 446:

(1) Covenants imposed by the vendor for his own benefit. These are personal to the vendor and enforceable by him alone, unless expressly assigned by him.

(2) Covenants imposed by the vendor as owner of other land, of which that sold formed a part, and devised to protect or benefit such unsold land. These run with the land without express assignment.

(3) Covenants imposed by a vendor upon a sale of land to various purchasers who are intended mutually to enjoy the benefit of and be bound by the covenants. These are found generally in conveyances under building schemes.

There was no express assignment or building scheme in this case, and the plaintiff could succeed only by proving that the covenant fell within the second class. The necessary requirements in order that a covenant should fall within this class are: (1) It must be a negative covenant. (2) It must touch or concern the land, that is to say it must benefit the land retained by the vendor or some part of it. (3) There must be an indication in the conveyance that the covenant is intended to attach to that land which it, in fact, benefits. The land must be defined so that it is easily ascertainable.

The covenant sued upon in this case was negative. It was incapable of benefiting the whole of the estate but it did concern that part in the neighbourhood of the defendant's shop. The fulfilment of the third requirement was a question of construction. Bennett J. read the document as declaring that the covenant was for the benefit of the whole of the unsold part of the estate. He followed *Re Ballard's Conveyance* (restrictive covenant which does not touch or concern the whole land will not be severed for the benefit of such part of the land as it does touch); and he held that here there was not an intention to attach it to the smaller part actually benefited. Hence the covenant was unenforceable. The parties were to be taken as endeavouring to annex the covenant to the whole and that was impossible. The Court of Appeal construed the document as indicating an intention to attach the covenant 'to the whole or any part or parts of the unsold settled property', and this included that particular part neighbouring on No. 200 Lord Street which it touched or concerned. The covenant was therefore enforceable as it satisfied all three conditions.

Presumably if the document had referred to 'such part of the settled lands as shall remain unsold' the Court would have regarded it as meaning the whole of the unsold estate, but the insertion of the words 'or parts' indicated that the unsold estate was not to be regarded as a whole but as something consisting of parts.

It is unfortunate that in consequence of its construction of the document the Court of Appeal did not find it necessary to review *Re Ballard's Conveyance*.

P. W. E. T.

TORT—CONTRIBUTORY NEGLIGENCE—COLLISION BETWEEN TWO SHIPS EACH GUILTY OF NEGLIGENCE—NEGLIGENCE HELD TO BE SIMULTANEOUS—HENCE DOCTRINE OF LAST CLEAR CHANCE DID NOT APPLY—DAMAGES APPORTIONED TO BOTH.

The Eurymedon. [1938] P. 41.

OWING to the negligence of her crew, the plaintiffs' vessel, the *Corstar*, was lying athwart the stream, when it was run into by the defendants' vessel, the *Eurymedon*, proceeding by night up the Thames. Hence the *Corstar's* anchor lights were confused with the shore lights by the *Eurymedon*; but if the latter's crew had been sufficiently alert, there would have been sufficient time to avoid a collision. *Held*, by the Court of Appeal, affirming Bucknill J., that both vessels were equally to blame. It was argued that, though the *Corstar* was negligent, the *Eurymedon* possessed the last clear chance of avoiding the accident. It was held, however, that as the *Corstar* had steam up, was ready to move and yet did not move, despite its improper position, the case was more nearly related to the *Loach Case* [1916] 1 A. C. 719 rather than to *Davies v. Mann* (1842) 10 M. & W. 546 (the donkey case).

This case extends the doctrine of continuing negligence as a means of alleviating hardship in cases of contributory negligence. Greer L.J. attempted to lay down principles springing from *Davies v. Mann*. A man will be responsible when he fails to exercise reasonable care, whether or not he knows of another's negligence, so long as his ignorance is due to his own negligence. If A knows of B's negligence and does not take due care he will be liable (*Davies v. Mann*). If he does not know, but should have known if he had kept a reasonable look-out (*Butterfield v. Forrester* (1809) 11 East 60), he is again liable. But if the negligence of both parties continues to the moment of the accident, or if the negligence of B causes A to be negligent, they will both be liable.

Hence, as Slesser L.J. pointed out, if the only defence of the *Eurymedon* had been that the *Corstar* was an unexpected object, on the authority of *Davies v. Mann*, *Tuff v. Warman* (1858) 5 C. B. (N.S.) 573, 586, the *Eurymedon* would have been liable. What indeed is more unexpected than a fettered donkey on the highway? But as the *Corstar* was capable of steaming into a reasonable position, her negligence continued till the accident occurred. It did not cease merely when it was seen, like the donkey in *Davies v. Mann*. It continued like the defective brake in *Loach's Case*. Moreover, the *Corstar* contributed to the *Eurymedon's* negligence, for owing to its position its anchor lights were mistaken for shore lights.

Scott L.J. touched on the conflicting principles, and pointed out (p. 58) that too great an insistence on the causation theory led one to regard the last link in the chain of causation as the cardinal factor. This was not so important as legal responsibility; cf. his citation of Lord Birken-

head in *The Volute* [1922] 1 A. C. at 141—144, who pointed out that the two negligences might not be simultaneous but successive; yet the Courts should hold both parties liable because (as Scott L.J. said at p. 60) 'on the broad common-sense view both contributed to the result'. The theory of continuing negligence is an attempt to lighten the burdens of the contributory negligence rules; for by following Lord Birkenhead's *dictum* it is possible for the Courts to decide whether the last clear chance rule is or is not relevant according to the facts of the case. Scott L.J. suggested a less confusing remedy when he pleaded that damages should be awarded in proportion to the negligence, as is done in the Admiralty Courts. This very topic is now being considered by the Law Revision Committee.

N. G. A.

TORT—LANDLORD'S LIABILITY TO TENANT FOR TREE PROJECTING FROM LANDLORD'S PROPERTY.

Shirvell v. Hackwood Estates Co. Ltd. [1938] 2 K. B. 577.

A HAD let land to B for a term of years. B's servant was killed while at work by the fall of a branch which overhung B's land from a tree on the adjoining land retained by A. The servant's widow claimed compensation from B under the Workmen's Compensation Acts and succeeded. B then sued A claiming an indemnity under the Workmen's Compensation Act, 1925, as he had to pay compensation because of the accident, which he alleged was due to the defendant's negligence. The Court of Appeal held that the Court below had rightly dismissed the action.

Greer L.J. cited *Bray J.* in *Smith's Dock Co. v. Readhead & Sons* [1912] 2 K. B. 323 that the right to an indemnity extends to the case in which the person to whom compensation has been paid is a dependant of a deceased person, who was entitled to compensation under the Workmen's Compensation Acts. It was immaterial that the injured party died and could not claim; but there must be a legal liability in some one other than the employer.

Greer L.J. and Bennett J. dealt with the landlord's duty to an adjoining tenant. B took the farm as it existed at the time of the demise and he could not subsequently complain of dangerous branches overhanging his boundary if they were present at the above time. Moreover his employees were in no better position (*Robbins v. Jones* (1863) 15 C. B. (N.S.) 221; *Cavalier v. Pope* [1906] A. C. 428, 430; *Cheater v. Cater* [1918] 1 K. B. 247), so the servant could not have succeeded in a common law action against B; he was an invitee on the premises and as such was not in a better position than A. The reason for this was that the tree was in substantially the same condition at the beginning of the lease as it was at the time of the accident and so the plaintiff must have been taken to accept it.

Greer and MacKinnon L.JJ. (Bennett J. dissenting) also held that even had there been such a duty towards the tenant to take reasonable care, A had fulfilled it as he had commissioned a forestry expert to deal with the trees on the estate.

Bennett J. found evidence of lack of reasonable care as no inspection

of the trees on the boundaries had been made and the evidence of the agents of A did not satisfy him. However, as the plaintiff was a tenant of A, this lack of care did not amount to a breach of any duty towards him or his invitees.

The Court held that as the deceased or his representative could not have recovered, no legal liability was created in B as was required by the Workmen's Compensation Act. Consequently B was not entitled to an indemnity under that section.

The important fact was the condition of the tree at the date of the demise. If the danger had arisen after that date the result would have been difficult to predict, but on the authority of Mellish L.J. in *Erskine v. Adeane* (1873) L. R. 8 Ch. 756, 761, it is probable that a claim would have been maintainable.

The law is loth to imply more than the necessary covenants between landlord and tenant (Woodfall, *Landlord and Tenant*, p. 771).

R. T. J.

TORT — MALICIOUS PROSECUTION — REASONABLE AND PROBABLE CAUSE —
DIVISION OF FUNCTIONS BETWEEN JUDGE AND JURY.

Herniman v. Smith. [1938] A. C. 305.

H., the appellant in this case, was a timber merchant; the respondent, S., was one of his customers. H. employed R., a haulage contractor, to deliver to S. the timber which from time to time he ordered. One of R.'s lorry drivers informed S. that on several occasions his delivery notes had been faked for a larger amount of timber than that actually delivered. S. informed the police; they made inquiries and discovered that the delivery notes had in fact on several occasions been faked. Eventually S. swore an information against H. and R.; they were prosecuted for conspiracy to defraud and were convicted; but their conviction was quashed on appeal. H. then brought this action for malicious prosecution.

In the Court of first instance Talbot J. left this question (*inter alia*) to the jury: 'Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing the prosecution?' (p. 314).

The jury answered this question in the affirmative, and accordingly, the other necessary facts having been proved, judgment was entered for H. This decision was reversed by the Court of Appeal, and H. appealed to the House of Lords.

The House of Lords unanimously dismissed the appeal, holding (*inter alia*) that in an action for malicious prosecution it is the function of the jury to find what the relevant facts are, and what are the true facts upon which the prosecutor acted, but that it is the function of the judge, not of the jury, to decide, in the light of the jury's findings, whether or not there was reasonable and probable cause for the prosecution. Talbot J. ought not to have left the question above cited to the jury. 'To ask the general question whether the defendant took reasonable care to inform himself of the true state of the facts', said Lord Atkin (at p. 317), 'appears to me in many cases merely to ask the jury what the judge has to decide for himself.' The division of functions in an action for malicious prosecution was settled before this decision. It was said by Hawkins J.

in *Hicks v. Faulkner* (1878) 8 Q. B. D. 167, 172, that the reasonableness of the accuser's belief in the existence of the facts on which he acted is a question of fact for the jury. The Lords disapproved this view, and followed statements of the law made in *Bradshaw v. Waterlow* [1915] 3 K. B. 527, 535, where Lord Cozens-Hardy M.R. said: 'All the material facts being ascertained, it was for the judge to say whether the defendants had reasonable or probable cause for so doing' (*i.e.* for indicting the plaintiff). It would appear, therefore, that instead of the question cited above Talbot J. ought to have left to the jury a question framed to elicit from them what were the true facts upon which the prosecutor, S., acted. Then, the jury having answered that question, the judge could have decided in the light of their finding whether or not there was reasonable cause for the prosecution.

This decision gives a curious result, for normally the jury decide questions of fact, the judge questions of law; and reasonable and probable cause is undoubtedly a question of fact. To decide whether a man had reasonable and probable cause for a prosecution is much the same as deciding whether he was negligent in not taking sufficient steps to ascertain the true facts. And in negligence it is for the jury (if the judge leaves the case to them) to find not only the material facts, but also whether they constitute negligence. One would have expected a strong reason for an unusual rule, but Lord Atkin gives only one reason (and that indirectly) that the decision of reasonable and probable cause is confided to the judge 'in the interests of prosecutor and accused alike' (at p. 316). And that is hardly a reason; those questions which are left to the jury are of equal importance.

P. G.

TORT—MASTER AND SERVANT—COMMON EMPLOYMENT—IMPLIED CONTRACT
AND WHAT IS COMMON WORK.

Radcliffe v. Ribble Motor Services, Ltd. [1939] 1 All E. R. 637.

THIS was an appeal to the House of Lords from the decision of the Court of Appeal reversing the decision of Hawke J. at Liverpool Assizes.

The Ribble Motor Services, Ltd., undertook to convey for X, a firm of transport agents, three different parties of excursionists by coach from Liverpool via the Mersey Tunnel to New Brighton. One party consisted of three coaches, the other two of a coach apiece. R. was driving one of the latter coaches. All five coaches started from the garage at Bootle at the same time and continued together until they dropped the parties, as arranged, at New Brighton. The drivers, as they had been directed, then started off together to return to the garage. They were entitled to choose their own route. After the Mersey Tunnel R. turned off, but kept to one of the recognized routes, and was followed by J., one of the other drivers. R. for some unknown reason stopped his coach and got out. J. stopped behind R. to see why he had stopped and then pulled out to pass him. R. was standing on the off side of his coach and was crushed and killed through the negligence of J. In an action on behalf of R. against the defendants the House of Lords held that the doctrine of common employment did not apply and that the defendants were liable.

Lord Atkin said that the doctrine of common employment is not looked upon with favour but 'it is too well established to be overthrown by judicial decision' (p. 641). Its basis is an implied contract between the master and the servant that the master is not liable to the servant for damage caused through the negligence of a fellow servant while engaged in common work. The development of this doctrine starts with the case of *Priestley v. Fowler* (1837) 3 M. & W. 1, where Lord Abinger felt that he could decide the case on general principles and described a remarkable medley of inferior agents for whom the master would not be liable. The doctrine was developed in later cases such as *Hutchinson v. York, Newcastle and Berwick Ry.* (1850) 5 Ex. 343, and finally settled by the House of Lords in *Bartonhill Coal Co. v. Reid* (1858) 3 Macq. 266, after hearing argument from counsel in *Bartonhill Coal Co. v. McGuire* (1858) 3 Macq. 300.

The whole difficulty in the doctrine is, however, to decide what is common work. Pollock B.'s test of working 'with a common object' (*Waller v. S. E. Ry.* (1863) 2 H. & C. 102, 109) is not a good one. As Lord Atkin said (at p. 644), it is not certain whether it assumes a conscious object aimed at by both workmen alike, or both workmen and their employer, and it is difficult to see how it falls short of the common object of assisting the employer to make a profit out of his business. Lord Atkin then went on (at pp. 645—646) to approve both the decision and the *ratio decidendi* in *The Petrel* [1893] P. 320. The consideration that risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. The effect of this when applied to the facts of the present case was the same as in *The Petrel*. The two men were not employed upon a common work. In the streets of Liverpool the one was no more interested in the skill of the other than in that of the drivers of the myriads of other vehicles in whose vicinity he might happen to drive. Such risk was not one of 'the natural risks and perils incident to the performance of his service'. As Lord Macmillan said (at p. 649), the work of the drivers involved 'their dispersal, not their collaboration'.

This explanation of the doctrine covers both *The Petrel*, which was distinguished by the Court of Appeal, and *Morgan v. Vale of Neath Ry.* (1865) L. R. 1 Q. B. 149, which the Court of Appeal followed.

J. B.

TORT—NEGLIGENCE—DRIVER OF CAR UNDER THE INFLUENCE OF DRINK—
PASSENGER ELECTS TO CONTINUE JOURNEY, KNOWING OF DRIVER'S
CONDITION—ACCIDENT IN WHICH PASSENGER INJURED—VOLENTI NON
FIT INIURIA HELD NO DEFENCE.

Dann v. Hamilton. (1938) 55 T. L. R. 297.

D. WAS a passenger in the car of H. She suffered personal injuries and H. was killed in an accident due to H.'s negligence while driving under the influence of drink. H., while far from being dead drunk, was under the influence of drink to such an extent as substantially to increase the chance of a collision arising from his negligence. Although D. knew

of H.'s condition, she nevertheless became or elected to remain a passenger in the car.

She brought an action for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, against the personal representatives of H., who pleaded *volenti non fit iniuria*, as she had voluntarily undertaken the risk.

Asquith J. held that D., by embarking in the car with knowledge of H.'s condition, did not impliedly consent to, or absolve him from, liability for any subsequent negligence on his part. He therefore awarded damages to the plaintiff. He remarked, however, that his decision might have been different if H. had been so drunk that to accept a lift was like undertaking an intrinsically dangerous operation.

In giving judgment, he remarked that the maxim says 'volenti', not 'scienti', and a complete knowledge of the danger is in any event necessary, but such knowledge does not necessarily import consent. The question whether the plaintiff was 'volens' is one of fact to be determined on the evidence. (See *Smith v. Baker* [1891] A. C. 325.)

In reviewing the authorities as to the scope and limits of the maxim, Asquith J. said that in many of the decided cases the plaintiff was in a contractual relation with the defendant, and the question was whether a term, express or implied, could be found in the contract to exonerate the defendant from liability. *Hott v. Wilkes* (1820) 3 B. & Ald. 304 established that the maxim was applicable to cases of trespass to the person. But the learned judge doubted whether the maxim is applicable to the tort of negligence. He said of *Cleghorn v. Oldham* (1927) 43 T. L. R. 465 (where it was held not to apply) that the decision must be limited to the particular facts of the case, and that, despite the denial by some text-books of its application to negligence, yet in certain cases where a dangerous physical condition has been brought about by the negligence of the defendant and after it has arisen the plaintiff, fully appreciating its dangerous character, elects to assume the risk thereof, the maxim has been held to apply: *Torrance v. Ilford U. D. C.* (1909) 25 T. L. R. 355 and *Cutler v. United Dairies (London) Ltd.* [1933] 2 K. B. 297. But where the act of consent which the plaintiff relies upon precedes and is claimed to license in advance a possible subsequent act of negligence by the defendant, the authorities seemed, in Asquith J.'s opinion, to show that the maxim will not apply. He quoted Lord Halsbury in *Smith v. Baker* (*supra*) where he says that a person crossing a busy street does not consent to injury even though he knows many drivers are negligent. A similar argument was put forward by Mellish L.J. in *Woodley v. Metropolitan District Ry.* (1877) L. R. 2 Ex. D. 384 at p. 394, a minority judgment but nevertheless preferred to that of the majority in the House of Lords in *Membery v. G. W. Ry.* (1889) 14 App. Cas. 179. It seemed a logical step from these cases to argue that a person who voluntarily travels as passenger in a vehicle driven negligently in the past is not 'volens' as to future negligent acts of the driver. Nor, as in the present case, is he 'volens' because he knows that the driver is under the influence of drink.

This case seems to contain a correct and logical application of well-established principles of law to a set of facts which, although it has not come before the Courts before, must nevertheless be of common occurrence.

TORT—NEGLIGENCE—PEDESTRIAN CROSSING—NEGLIGENCE OF PEDESTRIAN
— PEDESTRIAN CROSSING PLACES (TRAFFIC) REGULATIONS, 1935,
REGS. 3, 4.

Chisholm v. London Passenger Transport Board. (1938) 55 T. L. R. 284.

C., THE plaintiff in this case, was knocked down while crossing Fleet Street on a pedestrian crossing by an omnibus driver, a servant of the defendants. The pedestrian crossing was not controlled either by the police or by traffic lights. It was found as a fact that C. stepped on to the crossing when the omnibus was so near to it as to be unable to stop before reaching it. The Court of Appeal (du Parc L.J. dissenting) held that C.'s negligence prevented him from recovering damages.

In *Bailey v. Geddes* [1938] 1 K. B. 156 the Court of Appeal had held that where a pedestrian was on a pedestrian crossing not controlled either by the police or by traffic lights, and a motor vehicle was approaching the crossing, then the Pedestrian Crossing Places (Traffic) Regulations Nos. 3 and 4 applied, and (i) the vehicle must, unless the driver can see there is no passenger on the crossing, approach it at such speed that it can stop before reaching the crossing; (ii) the driver of the vehicle must allow free and uninterrupted passage to any foot-passenger who is on the carriage way at such crossing. In such a case, if an accident happens, the driver cannot plead contributory negligence on the part of the pedestrian because, if the regulations had been obeyed, there would have been no car upon the crossing at all which could have injured the pedestrian.

In the present case, Hilbery J. in the Court below considered himself bound by *Bailey v. Geddes* and gave judgment for the plaintiff. The Court of Appeal reversed this decision. Scott L.J. said (at p. 289) that neither regulation 3 nor regulation 4 of the Pedestrian Crossing Places Regulations applied directly to the facts of the case and the duty of a pedestrian in embarking from the footway on to the crossing is left to the common law. *Bailey v. Geddes* was distinguished on the ground that the pedestrians in that case were already on the crossing well before the car approached anywhere near it. Scott L.J. said (*ibid.*): 'The decision there did not touch the question of the duty of the pedestrian still on the footway not to embarrass traffic approaching the crossing by suddenly stepping on to it when the traffic has already come too close for it to stop easily, even though proceeding at not more than a reasonable speed.' He held that the plaintiff was guilty of negligence and that this was the sole cause of the accident; and that even if the driver had been negligent, the plaintiff's negligence would have been contributory.

It might seem that the decision of the Court of Appeal in the present case means that a foot-passenger will have no reason to think himself any safer on an 'uncontrolled crossing' than on any other part of the highway. But this is not so. If the pedestrian goes on to the pedestrian crossing carefully where there are no cars very near to it, then, on the authority of *Bailey v. Geddes*, the Pedestrian Crossing Places Regulations 3, 4 apply and, if an accident happens, the driver of the car will not be able to plead contributory negligence on the part of the pedestrian. On the other hand, pedestrians should not be reckless. If, as in this case, the pedestrian steps on to the road when a car is already so near the crossing that its driver cannot stop it in time even if it were going at a reasonable speed, then the pedestrian cannot complain if the Courts decide

that it was his negligence that was the primary cause of the accident. Any other decision would impose an impossible burden on the drivers of motor vehicles and would seriously impede the free flow of traffic in congested areas like the City of London.

A. M. I.

[The following note has been contributed by Mr. J. C. Macintosh of Grahamstown, South Africa.]

SOUTH AFRICA—APPLICATION OF CRIMINAL LAW TO PRIMITIVE PEOPLE—
HOW FAR BELIEF IN WITCHCRAFT IS 'EXTENUATING CIRCUMSTANCE'
IN MURDER.

R. v. Biyana.

In civil suits between native and native in South Africa ('native', i.e. 'member of an aboriginal race'), there are special Courts which administer native custom, and so solve with reasonable satisfaction the problem of administering justice to a primitive (or comparatively primitive) people. But in criminal matters there are no such special Courts, and there is no room for the direct application of native custom; except for a few statutory offences such as 'fighting', the code applied to the native is the same as that applied to the 'European'. This position creates difficulties, touching not merely the question of severity of punishment but also that of the actual substantive offence. Murder, for example, is the same for white as for black; but in practice it is almost impossible for the judge, and quite impossible for the jury, to draw no distinction between a killing with a stick by a white man, and a similar killing by a half-savage who habitually goes armed with a knobkerrie, and whose idea of gentle sport is a stick-fight. Belief in witchcraft, too, is still almost universal; what is to be done with a man who kills another in the genuine belief that the victim has caused the death of the assailant's father and is engaged in encompassing that of the assailant?

To some extent, of course, *solvitur ambulando—et non scribendo*. Many a direction has been given to a jury in the Transkei Native Territories which would not only horrify an English lawyer but would certainly be disapproved by the South African Appeal Court if it ever came before them. (It was generally felt, however, that the learned judge who directed a jury that 'no man ever kills another except under provocation, and if there is provocation it is not murder', was going a little too far even by Transkei standards!) But the position has been regarded as unsatisfactory; as has also the fact that even of natives convicted of murder, a very considerable proportion every year have been reprieved. In 1935, therefore, a section was incorporated in the General Law Amendment Act which established two categories of murder, murder with, and murder without, extenuating circumstances, and this permitted the judge, in his discretion, if the jury had found extenuating circumstances, to impose a lesser penalty than death. (The section is not confined to native cases.)

The Act, however, gives no indication of what are to be considered as extenuating circumstances. And doubts have been voiced as to how far primitive mentality and beliefs, and particularly belief in witchcraft,

could be so regarded. The doubts arose in consequence of the ruling of the Appellate Division in *R. v. Mbombela* (1933) A. D. 269. In this remarkable case, a native youth, believing that a small object he saw in a badly-lit hut was an evil spirit (tikiloshe), struck it with a stick and killed a small child. The Court ruled that the defence of mistake of fact must fail, since 'the standard to be adopted in deciding whether mistake of fact is reasonable is the standard of the reasonable man, and the race, or idiosyncrasies, or superstitions, or intelligence of the person accused do not enter into the question'. The crime, nevertheless, was not murder but culpable homicide, since there was no intention to kill a human being. Did this mean that in deciding the question of extenuating circumstances, too, the superstitions of the accused must be disregarded?

The point came crisply before a Circuit Court in *R. v. Biyana* (1938) Eastern Districts Local Division 310, in a case heard without a jury, so that the question of extenuating circumstances was for the judge (Lansdown J.P.) and the two assessors. The four accused had deliberately strangled an old woman. It was established that she had been 'smelt out' as a witch, responsible for several deaths and engaged in the encompassing of the death of two of the accused; and that this was the motive for the killing. His Lordship ruled, and the Court found, that the profound belief of the accused in witchcraft in general, and in the deadly activities of the victim in particular, constituted 'extenuating circumstances' within the meaning of the Act. 'An extenuating circumstance in this connexion is a fact associated with a crime which serves in the mind of reasonable men to diminish morally the degree of the prisoner's guilt. The mentality of the accused may furnish such a fact. His mind . . . may be subject to some erroneous belief, in circumstances which make a crime committed under its influence less reprehensible than it would be in the case of a mind of normal condition.' The accused were sentenced to terms of imprisonment ranging from fifteen to twenty years.

The ruling is generally regarded as sound, and will no doubt be followed in all the Provinces; a matter of some importance, since on an average some four cases of witchcraft killing come before the Union Courts each year.

BOOK REVIEWS.

Personality in Roman Private Law. By P. W. DUFF. Cambridge University Press. 1938. xiii and 241 pp. (15s.)

MR. DUFF in one or two places modestly refers to his work as an 'essay'. It is well over 200 pages long, amply documented and full of insight, but the description is nevertheless acceptable, for there is a lightness of touch and a lack of pretentiousness not often to be found in books on this subject. The first chapter is devoted to the inevitable discussion of terminology—'inevitable' because, though this discussion is a necessary preliminary before the chief texts can be tackled, strict terminology is not the Romans' forte, and it is indeed part of Mr. Duff's thesis that any attempt to press their words into an exactitude which was as foreign to them as it is to English lawyers must necessarily result in a falsification of their ideas. Of the terms discussed (*persona*, *caput*, *corpus* and *universitas*), the last is the most controversial, for it appears to be the nearest that the Latin language ever evolved to our 'corporation' in the strict technical sense, and one of the chief questions is whether it had already got this sense in the classical period. Mr. Duff goes into each passage in which interpolation is alleged, but finding the allegation justified in some only concludes that there is little, if any, distinction between the classical and Byzantine use of the word. In both periods, though it could be used of any group, when lawyers emphasize that they are speaking of a group as such they generally mean 'as a corporate body', but in neither is it a true word of art with the implications of the modern 'legal personality'. This is an important result, for it provides us with an instance of a danger that lurks unsuspected in the hunt for interpolations. One may err in ascribing a modern theoretical conception to the Byzantines when contrasting them with the classical jurists, as well as by denying all advance towards theoretical construction in the classical period. On the vexed question of the right of association, Mr. Duff holds with Mommsen that express authorization was necessary under the Empire for all *collegia* other than mere burial clubs, a view which does indeed account for more of the conflicting evidence than any other, but his complete separation of the right of association from the grant of corporate capacity (until the time of Marcus Aurelius) is open to serious objection. Like the similar (but not identical) view of Mitteis, this conclusion is based on the assumption that in the chief passage (D. 3.4.1) *corpus . . . habere conceditur* means, 'are allowed to have corporate capacity'—a translation which is extremely dubious because, as is admitted, *corpus* is nowhere else used in this sense. But quite apart from this point, and the difficulties of dealing with a text which is certainly correct, it seems that Mr. Duff is here false to his own principles and ascribes to the Romans a more clear-cut and logical theory than is borne out by the empirical and piecemeal nature of their other rules in the matter. His theory has no doubt the great advantage that it enables us to reconcile

the restrictions of which Gaius speaks in the text (*paucis admodum in causis concessa sunt huius modi corpora*) with the existence as proved in numerous inscriptions of a great many unimportant *collegia*, but it is difficult to believe that if the Romans had really once fully grasped the difference between allowing an association to exist and granting it corporate capacity, only this text should survive to witness such a considerable feat of abstraction. It is true of course that according to Mr. Duff's view, the distinction ceased to have any importance when M. Aurelius allowed the right of manumission and of taking legacies to *omnia collegia quibus coeundi ius est*, but again, if the distinction had been clearly recognized by Gaius, it is strange that so momentous a change should have been introduced by a side-wind in this manner. The provision in the edict about actions by and against *collegia* would on this view have suddenly changed their meaning; instead of applying to a comparatively few powerful associations which had a special grant of corporateness, they would have embraced all sorts and conditions of associations, provided their existence was authorized in some way, and that without any direct imperial enactment, at a time considerably later than Julian's settlement of the edict. It is more likely that the corruption in the text goes deeper than this theory implies, even if no one has yet succeeded in producing an acceptable restoration. Opinions on this point will continue to differ, but there is no mistaking the skill with which the author puts his arguments, in particular that which is directed against the almost universal acceptance of Conrat's conjecture *sodalitium* for *societas* in the ungrammatical first sentence. If the *vectigalium publicorum socii* are, as the second sentence says, among those rare cases in which *corpus habere* is permitted, the same reference to *societas* is certainly needed in the introductory remark, whoever may have written it.

The most general interest attaches to the last chapter, which rounds off the work by a discussion of the different theories of legal personality and the evidence which may be adduced to support each of them from the Roman texts. The result is, as one might expect, negative. 'On this Fiction and Reality problem it (Roman law) resolutely refuses to answer a question which had not yet been asked, and Realists who repudiate its assistance lose very little, and Fictionists who rely on it gain even less.' It is good to have this stated plainly and good to have stated equally plainly (though with becoming modesty) that Gierke was wrong not only in attributing fictionism to the Romans, but even in attributing it to Innocent IV. Holland, fictionist though he was, pointed out that the Pope 'does not use the phrase *persona ficta* as might be inferred from p. 279 of Gierke's *Genossenschaftsrecht*, Vol. III', but Holland's book is not used much by students of Jurisprudence any more, whereas we hope Mr. Duff's last chapter will be. As a whole the work is particularly welcome to the reviewer because it illustrates a pet theory of his, *i.e.*, that because the atmosphere of practice in which the classical law was made greatly resembled that in which the Common Law has been and is being developed, English scholars have a peculiar contribution to make to the study of the Roman law. *Begriffsbestimmungen* no doubt have their place, but for insight into the working of a system from which codification was absent, and practical lawyers had to get on with very little help from the Legislature, the analogies of English law are apt to be still more serviceable.

H. F. J.

The Law of Negligence. By J. CHARLESWORTH, LL.D., of Lincoln's Inn and the North-Eastern Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1938. lxviii and 576 pp. (40s. net.)

THIS book will be used a good deal by practitioners in general and by every one in particular who is interested in the topic; and we predict for it a long life together with the increasing girth associated with prosperous old age. There was plenty of room for a new monograph on Negligence and Dr. Charlesworth's learned and well-balanced discussion of the many problems that arise is no less than we should expect of such an experienced writer. Within five minutes of receiving the book we used it for probing a troublesome question and found it of great assistance—none the less so because no confident answer could be given to it.

In spite of the two cases cited at pp. 9–10, we still think that 'wilful negligence' is a phrase to be eschewed and that in the great majority of cases intentional harm is a specific tort of one sort or another which is different from the tort of negligence; *e.g.*, trespass to the person or to chattels. Moreover, the opposite view is confusing as tending to import the peculiar 'duty' idea of negligence into intentional wrongs.

The devotion of three chapters covering eighty-six pages to the perils that beset a traveller by road, rail or sea is a striking commentary on the increased risk of death or disablement which motion involves nowadays. At p. 72, it is said that the driver of a vehicle must travel at such a speed that he can stop within the limits of his vision. It might have been made clearer either by explicit statement, or at least by cross-reference to pp. 438–439, that in *Tidy v. Battman* Lord Wright and Slessor L.J. declined to regard this as a principle of law.

With 'Dangerous Premises' and 'Dangerous Things' Dr. Charlesworth is on ground that he has already explored. His preference for the phrase 'absolute liability' to 'strict liability' is well-backed by judicial usage; but his reason for his preference reminds us of Mr. Blotton's mode of defining another term in *Pickwick Papers*. 'Strict' may be a vague adjective, but it is more accurate than using 'absolute' in a sense which is nothing like that given in the dictionary, and which, if Dr. Charlesworth had consistently adhered to it, would have compelled him to exclude from his monograph the very thing which he includes in it, *i.e.* liability of the *Rylands v. Fletcher* type. In this connexion the titles of Chapters 9 and 18 need remodelling. Chapter 9 on 'Dangerous Things' is really limited to the rule in *Rylands v. Fletcher*. Chapter 18 on 'Damage by Chattels' deals with dangerous chattels. But most people would regard 'Dangerous Things' as including 'Chattels' and possibly even 'Dangerous Premises' (Chapter 8). In this last chapter we are grateful to the learned author for his citation of *Morgan v. Girls' Friendly Society* [1936] 1 All E. R. 404, which covers a point on which we had hitherto been unable to find direct authority.

The chapter on 'Contributory Negligence' is a skilful treatment of a subject which still lacks both a clear theoretical basis and a consistent practical test for its application. In Anglo-American law it has been supported at one time or another by at least five different principles and a judge in trying a case may have to select from or to combine at least three different tests for determining its existence. If we rightly understand Dr. Charlesworth, he appears to offer two such tests: (1) In collision cases,

'Whose negligence was the real or substantial cause of the collision?' (p. 432). (2) In other cases, the plaintiff cannot recover 'if he has failed to exercise reasonable care for the safety of himself or his property, under all the circumstances of the case, so that the damage which has occurred is a direct consequence of his failure to exercise that reasonable care' (p. 428). It is questionable whether this distinction is supported by the authorities. Moreover, the 'last chance' test has been so much criticized latterly that there is some risk of forgetting that in some cases (though not by any means in all) it may be and has been a useful guide in reaching a sensible decision.

It is urged (at p. 425) that contributory negligence does not involve the idea of a breach of a legal duty to take care. This ought to be right, although the learned author has to deal with some cases that at least need explanation on this point. Since the book was published, du Parc J. has regarded the proposition as unassailable in the Court of Appeal: *Lewis v. Denny* [1939] 1 All E. R. 310, 317. The broad question in contributory negligence is, 'Was it the plaintiff's own conduct that brought about his injury?' and, although lack of care on the part of the plaintiff is closely relevant to the inquiry, the question, 'Did he owe a duty to the defendant to take care of himself?' is meaningless, whether the basis of contributory negligence is the logical one of causation or the moral one of blameworthiness of the plaintiff.

The discussion of 'Defences to Action for Breach of Statutory Duty' (pp. 416 *et seq.*) is another very helpful section, though it is only some adventurous appellant to the House of Lords who can now discover what weight is to be attached to Lord Wright's *dictum* in *Flower's Case* [1936] A. C. 206.

P. H. W.

Studies in the Glossators of the Roman Law. Newly Discovered Writings of the Twelfth Century. Edited and explained by HERMANN KANTOROWICZ, with the collaboration of W. W. BUCKLAND. Cambridge University Press. 1938. xviii and 323 pp. (30s. net.)

THE direct influence of Roman law on the development of medieval English jurisprudence was small, and, probably for this reason, English scholars have given little attention to the study of the history of Roman law in the Middle Ages, after the revival at Bologna at the beginning of the twelfth century. Vinogradoff wrote a slender but admirably clear survey in 1909, which, as its editor stated on its republication twenty years later, still 'retains its peculiar merit' and 'lasting value' as a study of the 'core of the subject, which only a master could treat with the simplicity and concreteness here displayed'. But many of the results and much of the scholarship on which Vinogradoff relied have been subsequently challenged, and the present substantial volume by a well-known authority, formerly professor in Freiburg i. Br., and now Assistant Director of Research in Law in Cambridge, will therefore be welcomed by English readers as a correction and expansion of Vinogradoff's views. It is flattering to English readers, and may perhaps be a stimulus to further English work in this field, to find that Prof. Kantorowicz's new results

are largely based on a single 'incomparable' manuscript in the Royal collection of the British Museum; and Cambridge readers will note that the civil law manuscripts of Cambridge colleges, particularly the invaluable library of Gonville and Caius, have been largely drawn on for corroboration. Not the least of the merits of Prof. Kantorowicz's book is the tripartite Index, comprising *Initia* and *Codices manu scripti* as well as *Res et Personae*: future students will find in these fifteen closely-packed pages a key to the history of Roman law in the twelfth century.

Nevertheless, this is not an easy book to review, for it covers many topics. In the first place, it is necessarily and rightly historical rather than legal in character, though there is occasional illustrative discussion of legal doctrines and the attitude of twelfth-century civilians to questions of doctrine: a problem arising from the law of dower, discussed on p. 98, leads, for example, to some admirable observations on p. 101. But study and interpretation of the texts is merely incidental to the author's main purpose, which is to examine the manuscript already referred to—'not an ordinary miscellaneous volume, arbitrarily compiled', but 'judiciously selected to give the best of what Italian and French science of Roman law had hitherto produced' (p. 2)—and to make an 'edition of unpublished *Opuscula Glossatorum*'. But the edition of texts (pp. 231–305) is only a third the length of the Introduction. The Introduction, on the other hand, is much more than an analysis of the contents of the manuscript: its rich content reopens all-important questions in the history of Roman law in the twelfth century, and particularly the hotly argued problems of the development of the Italian and French law schools. One is left, among this mass of material, with the impression that the author has not made up his mind whether to restrict his Introduction to the necessary technical problem of determining 'the age, the school, and the author of the writings', or whether to begin, in the present volume, the comprehensive history of legal scholarship, the preparation of which he announces in his preface. There is little doubt that a majority of Prof. Kantorowicz's readers will be grateful to him for his broader arguments and conclusions, rather than for the critical and polemical sections of his book; and though it is true that the controversial criticism is the essential basis of the general conclusions, it is hard to escape the conclusion that their juxtaposition in one volume is disadvantageous, and hinders a clear exposition of Prof. Kantorowicz's main theme. Chapter VIII (on the 'Summa Trecensis' and the 'Quaestiones de Iuris Subtilitatibus') would, in the view of at least one reader, have been more appropriately placed in a critical Review, and that applies also to many other shorter sections. If, after such publication, Prof. Kantorowicz's arguments—which seem in the main convincing—had been accepted by his learned colleagues, it would then have been possible to incorporate them with greater precision and greater effect in a volume such as the present. As it is, the reader is left to pick out for himself from polemics and textual criticism the new points which affect what was, for Vinogradoff, the 'core of the matter'. Even what seems, for Prof. Kantorowicz, to be the basis of his whole argument, and therefore the logical starting-point of his book—his highly justified attack on the 'believers in the continuous existence of a science and of schools of Roman law', both in Provence and in Italy, on the 'adherents of the continuity dogma', and specifically on Fitting's fantasy of a 'pre-Bolognese' law school in Rome—is only incidentally discussed. Prof. Kantorowicz's object is 'to re-enthroné Irnerius in his austere and archaic dignity as

the first and greatest writer of juristic glosses, his one and only form of literary work' (p. 4); and then to show how, under his successors, the Four Doctors, and their pupils of the next generation, the earliest type of legal writing, the gloss, was severed from the text, and, thus separated, led on to fuller, more comprehensive and more systematic forms of commentary, the *apparatus* (p. 69), which was Bulgarus' contribution, the *summula* (p. 73), and so to the full systematization of the *Summa* (p. 172), the earliest of which Prof. Kantorowicz attributes to Rogerius (p. 147). Prof. Kantorowicz shows also—and this is perhaps the most illuminating part of his book, though the main outline has long been accepted—how the growth of different views among the Four Doctors, the equitable interpretation of Martinus Gosia and his followers, and the strict interpretation of Bulgarus and the orthodox school, led to an even more fruitful literary form, the *Dissensiones Dominorum*, which, like the *Quaestiones disputatae*, kept creative argument alive and prevented systematization killing the more original types of legal thought and literature. Thus in the course of two generations every known type of legal literature had been created, and at the same time two permanently distinct schools of legal thought. Through Martinus' pupils, Rogerius and Placentinus, the equitable school found a home in France, where it was associated with sympathetic currents of canonistic teaching, and thence it spread, through Vacarius and the canonists, to England.

Prof. Kantorowicz's analysis of these momentous developments, supported by an imposing armoury of erudition and a subtlety of which Placentinus might have been proud, is convincing and reliable; but a simpler and more direct statement would have been more effective, and this could easily have been secured if the author had thrown his ample material into the form of a history, instead of dispersing it among a number of 'Studies' of varying character and disparate interest. On the other hand, controversy was unavoidable. Before the work of construction could begin, the ground had to be cleared of debris, and there was never any field of scholarship so littered with debris as that which Prof. Kantorowicz has made his own. He has many opportunities to illustrate and ridicule the 'luxuriant imagination of certain leading scholars' (p. 50): one relatively unimportant work alone, for example, has been attributed (p. 66) to seven different writers, ranging in time from the age of Justinian, through Irnerius to Placentinus or even one of Placentinus' followers. With the elementary critical issues in such a state of confusion, there was room for clearing the ground; and Prof. Kantorowicz, who is too keen a controversialist to resist even the smallest pretext for attack, is at his happiest in exploding vain hypotheses and false suppositions, especially those of Fitting, whose 'international fame as the highest authority' it is difficult, at this distance of time, to understand. Precisely because this is a volume of 'Studies', in which the innumerable points, small and large, which have attracted Prof. Kantorowicz's attention in a life spent in close acquaintance with the authorities, are pressed into his attack on muddled thought and wishful thinking, it is as impossible to give any impression of the mass of information on special points which the author takes this opportunity to let loose, as it is to criticize detail. The author shows a certain tendency both to exaggerate the importance of the newly discovered writings and to overreach himself in argument. But it may confidently be said that, if his main purpose was to put the study of Roman law in the twelfth century on a surer critical foundation,

he has succeeded in his task. The present volume attempts more than most preliminary studies and less than most finished histories. For this reason students of legal literature and history will look forward to the more comprehensive work on which Prof. Kantorowicz is engaged, and will expect to find there the balanced and logical survey of the period under consideration, which a volume of Studies, burdened with detailed criticism and polemics, could not provide.

The Personality Conception of the Legal Entity. By A. NÉKÁM.
Harvard Studies in the Conflict of Laws, 3. Cambridge,
Massachusetts: Harvard University Press. 1938. 131 pp.
(\$2.00.)

THIS study of a perennially interesting theme is acute and stimulating, but a little disappointing. Dr. Nékám begins with a warning against the pursuit of the absolute in legal studies and against generalizing the ideas of one age or country and assuming they are to be found elsewhere. This is important and can hardly be repeated too often; but it is an exaggeration to say 'Law must appear as natural, obvious, and absolute in order to have the force with which to impose itself upon those whom it would govern', and it seems an odd and unhelpful terminology to attribute all ideas of justice and equity to 'emotion'. Then he fiercely attacks what he calls 'the personality theory', meaning apparently the doctrine that individual men and women are made subjects of rights by natural law and that other legal entities ought to be capable of rights if they resemble men and women in certain respects which by natural law make them persons. He points out that many systems have known rightless men, which is unquestionable, though his Roman law is thirty years out of date, and maintains, rightly, that 'Everything that the community chooses to regard as such can become a subject—a potential center—of rights, whether a plant or an animal, a human being or an imagined spirit' and that the lawgiver can give to such a subject, or 'legal entity', any right or collection of rights, no minimum being prescribed by nature. He draws a valuable distinction between the 'administrator' of a right, who must have will, and the 'subject' or 'beneficiary', who need not: the two normally coinciding in sane adults. Then follows a discussion of the nature of the legal entity which promises light on a dark problem, but is hard to follow. The reviewer confesses himself baffled by 'In the same way as the socially protected interests of the entity, so the entity itself for the furtherance of whose socially important purpose these interests are set aside in the emotional valuation of the community, must be rationalized into a purely legal abstraction, once a legal relation begins to be rationally explained' and 'It is, therefore, not only superfluous, but impossible, to speak about the will of the legal entity or some other such metaphysical or empirical quality of it'. As with Judge Dowdall's *Estatification*, we feel there is some profound truth in the analysis of the legal entity into a complex of relations, but the well is too deep.

It is argued, convincingly, that both Gierke's Realism and Savigny's Fictionism are too anthropomorphic. But the main object of attack is

Saleilles and his doctrine of *Personnalité Juridique*. Dr. Nékám has no difficulty in showing that both Saleilles and his opponents, in disputes as much political as legal, were influenced in their views on the nature of personality by their wish to justify particular rules; but this must be obvious to anyone who has studied the controversies with which he deals. It seems that earlier parts of the book were written with an eye on these controversies, and it may be suspected that Dr. Nékám has generalized, as a criticism of all theories of personality, much that is really only relevant to some particular French jurists. This suspicion is borne out by his chapter on the Common Law. He shows clearly, and with a wealth of interesting quotations, that no definition yet given of a corporation is adequate, or nearly adequate, to mark off corporations scientifically from the great variety of unincorporate bodies to which English and American law have accorded some measure of recognition. But he does not assert that either the word personality, or the idea that the essence of a corporation is any resemblance to a human being, has played much part in our law, and the chapter does not fit neatly into the scheme of the book.

A concluding chapter emphasizes that we cannot learn much about the nature of a legal entity by asking whether it has personality or not: we must always ask whether it has or has not the particular right or rights with which we are at the moment concerned. In the law of Conflict we must take especial care not to be misled by assuming that all persons and corporations in all countries are alike in their legal position.

It is much to be hoped that Dr. Nékám will write a longer book clarifying his ideas and explaining how they can be applied to practical problems.

P. W. D.

The Legal Aspect of Money. By F. A. MANN, LL.D. (London); Dr. Jur. (Berlin). Oxford University Press. 1938. xxv and 334 pp. (21s. net.)

THIS is the first work in the English language to deal with the legal aspect of currency problems as a whole. The lawyers have fought shy of the subject because it involves an excursus into economics and the economists have felt great diffidence in approaching it from the point of view of the law. Dr. Mann has not been dismayed by the prospect of finding himself faced with questions of either kind and this has enabled him to give adequate treatment to such matters as the nature of the unit of account in pecuniary transactions, the legal effect of the nominalistic principle and the maze of legal problems resulting from the financial upheaval of the post-war period. His treatise is a monument of erudition. The questions which arise are not only considered in relation to the relevant principles of English law but are also studied comparatively and, in particular, with special reference to the conflicts of law which are inevitably associated with the topic. The learned author appears to have dealt with every English case which is in point, and some hundreds of Dominion, American and continental decisions are also discussed. The earlier part of the book is, perhaps, somewhat heavy-going for those who are not familiar with the role which currency plays in the scheme of

national economy. But its value is indisputable because nowhere else will be found so full a statement of the fundamental problems which arise in connexion with the legal aspects of money. English lawyers know little or nothing of the theory of nominalism and of its various phenomena, which have been neglected in England and have only been studied to any extent by continental economists. Dr. Mann has in this respect done much to fill a gap which has hitherto not attracted attention because its existence was unknown.

The subject of money is one bristling with legal problems and these are very largely of an international character which lend themselves in a special degree to treatment from a comparative point of view. Dr. Mann has made a very solid and lasting contribution to the development of the comparative study of law and his treatise may well come to be regarded at some future date as a milestone along the road which modern research workers are endeavouring to build through the jungle of conflicting rules of law which at the present day furnish so serious an obstacle to the full realization of international collaboration in the interests of justice. How far the learned author's conclusions on economic questions are well founded is a matter beyond the competence of a mere lawyer to decide, but no one can doubt the value of an exposition of the matter which points out the existence of the economic background to the legal monetary problems of an international character which have been giving so much trouble to the judges of all jurisdictions during the last twenty years.

An English lawyer, with his instinctive distrust of solutions based on theoretical considerations, an attitude which in a workaday world is not without its justification, will no doubt desire an appreciation of the practical value of the work under review. The answer is that so long as exchange rates oscillate as at present and currency restrictions prevail the type of problem dealt with in this book is certain to recur and anyone who has to deal with such questions will find invaluable guidance in Dr. Mann's researches. It is not always possible to agree with his conclusions. Writers trained on the continent are, on the one hand, prone to read into our case-law formulations of principle which are not always present. On the other hand, they tend in some instances to minimize the binding effect of precedent. But the very acute and penetrating analysis by Dr. Mann of the English decisions on such questions as that of the gold clause is the product of a distinguished and scholarly mind brought to bear on the subject and as such it will be of the greatest value both to the theorist and the practitioner.

H. C. G.

Marine Policies. By WILLIAM HENRY ELDRIDGE. Third edition. By HARRY ATKINS. London: Butterworth & Co. (Publishers), Ltd. 1938. xlviii and 291 pp. (30s. net.)

THE literature of marine insurance law is not extensive and the textbooks which deal with it otherwise than in an elementary form can be counted on the fingers of one hand. This is due to the fact that knowledge of this branch of commercial law is confined to specialists and the average practitioner or law teacher is very rarely brought into contact with it.

Nevertheless, marine insurance law is in many respects the most scientific and systematic part of the common law. The best brains on the English Bench and at the English Bar have been devoted to it since the days of Lord Mansfield, with the result that the principles underlying it have been stated with a clarity and a degree of precision which has made it a model for the rest of the world. These principles are for the most part well settled and modern litigation very largely takes the form of disputes as to the interpretation of the clauses which are used to supplement the provisions of the standard form of marine policy which is scheduled to the Marine Insurance Act of 1906. The volume under review is mainly concerned with this aspect of the subject and it serves its purpose in furnishing a guide to those who are faced with problems of this nature. It cannot hope to supplant Arnould's magisterial treatise, but there must be many lawyers whose pockets are not sufficiently stocked to enable them to indulge in the luxury of acquiring one of the most costly of legal text-books, and for them *Eldridge on Marine Policies* provides a reasonably priced alternative. This, the latest edition, represents an improved form of the work as the citations have been removed from the text to footnotes. Recent cases have been noted and the result is a very useful manual for those whose main desire may be to obtain access to a concise statement of the law. The Appendices contain a valuable selection of the more important clauses which in present-day practice are used to cover risks of a special character.

H. C. G.

The Law and the Constitution. Second edition. By Dr. W. IVOR JENNINGS. London: University of London Press, Ltd. 1938. xviii and 322 pp. (7s. 6d.)

The Law and the Constitution won a place for itself among the indispensable works on Constitutional Law almost as soon as it was published, and the passage of time has only enhanced its reputation. It has now been revised and enlarged, the principal changes being obligingly indicated by the author in the preface. The book was intended for students, but it was rather a hard nut for them to crack, especially as Constitutional Law is a second-year subject at most universities, so that the tendency towards simplification in the present edition is very welcome. The introductory chapter has been rewritten with a view to giving a historical introduction to the subject, and the discussion of the Separation of Powers has been relegated to an appendix. In Chapter II Dr. Jennings is more concerned with expounding his own views on the *Rule of Law*, a term which he now adopts in preference to the *Reign of Law*, than with polemics against Dicey, whose theories receive a thorough consideration in a second appendix. In the remaining chapters the author has tried to meet criticisms levelled against the first edition and to incorporate all recent constitutional developments. There is, however, no reference in the section on 'The Mandate' to the opposition of right-wing Conservatives to the Government of India Bill, which was in part based on the ground that the Government had received no 'mandate' from the electorate to introduce the reform. The third appendix contains a note on the author's theory of law, and we feel that Jurisprudence would be

a more interesting subject if Dr. Jennings' racy style were copied by other writers. There are one or two misprints—neither the fifty-first volume of the *Yale Law Journal* (p. 231) nor the ninth volume of the *Cambridge Law Journal* (p. 51) has as yet appeared—and a table of cases would improve the usefulness of the book. But we make these comments with diffidence lest we should be suspected of ingratitude, especially as we gather from a footnote on p. 99 that Dr. Jennings' work on *Parliament*, intended as a companion to his *Cabinet Government*, is nearing completion.

D. W. L.

The Law of Mortgages. By Dr. H. G. HANBURY and C. H. M. WALDOCK. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1938. xl and 502 pp. (25s.)

THOUGH this book was written in collaboration, Mr. Waldock is primarily responsible for the first, and longer, part which deals with mortgages of land. The opening chapter contains an excellent analysis of the term 'mortgage', and an instructive comparison between it and analogous transactions such as pledge and lien. Mr. Waldock then goes on to deal with the creation of mortgages, and it is pleasing to see that he does not adopt the same suspicious attitude as Dr. Cheshire towards the mortgage by way of a legal charge which was introduced by the Law of Property Act, 1925. It is being used more and more in practice, and if it were made the sole method, practically all the sting would be taken out of Maitland's remark that our mortgage deed is 'one long *suppressio veri* and *suggestio falsi*'. There follows an interesting discussion of the nature of the Equity of Redemption and of what constitutes a 'clog' thereon; the accuracy of the section on the postponement of redemption is shown by the fact that it needs little modification in the light of the important recent decision of *Knightsbridge Estates Trust, Ltd. v. Byrne* [1938] 4 All E. R. 618. The chapter on priorities is very helpful, though we would like to make two suggestions. Some mention should have been made of the Transitional Provisions of the Law of Property Act, 1925, in so far as they affect the priorities of mortgages created before 1926, and the attempt to elucidate the 'apparently insoluble case' on p. 344 by applying the doctrine of subrogation should have been prefaced by a discussion of whether resort can properly be had to subrogation, instead of merely mentioning this problem in a footnote which may easily be overlooked. The last three chapters deal with mortgages of chattels, choses in action and ships, for which we have to thank Dr. Hanbury. But traces of style in preceding chapters seem to indicate that he contributed more than advice to the writing of the first part of the book. When we read (at p. 19) that 'Equity is still alert to exorcize the devil of extortion, who after all is never very far away', we instinctively wish to say, 'The hands are the hands of Waldock, but the voice is the voice of Hanbury'. The authors have broken new ground in producing this book, for they have given the intelligent student a source from which he can get more information about the important subject of mortgages than is to be found in the standard text-books on Real Property, without having to go to those detailed treatises which, as Mr. Justice Langton once remarked, delight the leisure hours of the residents of Lincoln's Inn.

D. W. L.

Annual Digest of Public International Law Cases, Years 1931—1932. Edited by H. LAUTERPACHT, M.A., LL.D., Whewell Professor of International Law in the University of Cambridge, of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. 1938. xlv and 464 pp. (40s. net.)

THIS is the sixth volume which has appeared of a series containing a collection of cases decided since 1921 by national and international tribunals involving questions of international law. Like all its predecessors it will become essential to every advanced student of the subject.

Under the heading of the Relation of Municipal Law to International Law we find the important Canadian case *Re Arrow River* (Case No. 2). In Panama a case involving similar issues was decided in an opposite sense (Case No. 5). A French decision holding a contract connected with a revolution in Venezuela to be void is a useful addition to municipal cases on the doctrine of Comity (Case No. 9). The crop of cases on Recognition (Cases No. 24—28) gives us material on the right of an unrecognized government to sue in the Courts, the position of such governments as defendants, and the applicability before a foreign Court of their laws. The section on State Succession yields two very interesting German decisions. One discusses the legal effect of the partition of territory on the rights possessed by corporations formerly existing in the territory affected (Case No. 39). In the other case the German Supreme Court for Civil Matters held that where a part of Upper Silesia had been ceded by Germany to Poland a general debt arising from the negligence of a municipal slaughterhouse was 'not essentially situate in one specific part of the territory'. Consequently neither the part of the former German municipality which was now in Poland nor that part remaining in Germany could be held liable for the debt as successors. But it may be felt that most of the cases in this section, as in the same section in preceding volumes, do not create any very conclusive precedents in the matter of State Succession, though they are not any the less interesting or valuable for that reason.

Cases on Jurisdiction are of somewhat meagre interest. The attention of students of the *Cutting Case* should be called to the decision of the Mexican Supreme Court in 1932 in *Re Gonzalez* (Case No. 79). There, again, the Court exercised jurisdiction in respect of a crime committed by an alien outside the territory of the Mexican Republic but affecting the legal interests of a Mexican citizen. *Croft v. Dunphy* (Case No. 82) and a French decision holding that a member-State of a federation was not entitled to immunity (Case No. 84) are worthy of notice. The distinction drawn with regard to the Russian Trade Delegation in Italy between the public and private law activities of a foreign State is not unfamiliar but repays study (Case No. 86). There are some curious reflections on treaties as 'part of public order' in Egypt (Case No. 94).

In the section on State Responsibility the *Salem Arbitration* between the United States and Egypt (Case No. 98) and the *Chevreau Arbitration* between France and Great Britain (Case No. 102) are of outstanding interest.

The Individual in International Law provides varied material. We may note an Italian decision on the recognition of foreign corporations (Case No. 146), a Hungarian decision quashing a conviction for an offence other than that for which extradition was granted (Case No. 169) and

Laubenheimer v. Factor decided by the Supreme Court of the United States (Case No. 60). Passing on to Diplomatic Immunities, a Guatemalan decision, in which criminal jurisdiction was exercised in respect of an act committed by a diplomatic agent during his mission, after that mission had terminated, will interest us (Case No. 180). *Triquet v. Bath* is apparently good law in Chile (Case No. 181). The Naples Court of Appeal has some useful remarks on the law relating to consuls (Case No. 186).

The section on Treaties is disappointing. With regard to War, Disputes and Neutrality, *The Bathori* (Case No. 227), the French decision in *The Tibor* (Case No. 228) and the American case *Royal Holland Lloyd v. United States* (Case No. 229) merit special attention.

J. M. J.

Principles of Company Law. Second edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law, Recorder of Pontefract. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1938. xlviii and 320 pp. (7s. 6d.)

THE student usually approaches the subject of Company Law with some displeasure and not a little fear, due mainly to the great mass of statutory detail with which he is at once confronted, and the corresponding lack of principle. This little book will certainly assist him in understanding the main principles of the subject, and Dr. Charlesworth is to be congratulated on the way in which he has illustrated these principles by reference to cases, the essential facts of which are set out in the text.

In this edition, which has increased in size by some fourteen pages, the author has partly rewritten Chapter I on the General Nature of a Company. Even so we think it might have been well to elaborate this chapter still further, especially by an early reference to *Salomon's Case*, which is dealt with only in the chapter on Registration. A firm grasp of the essential nature of a company will save the student from many pitfalls later in the subject. The chapter (V) on Promoters contains the rather puzzling statement (p. 43): 'The articles cannot relieve the promoters from their liability to make disclosure, or to have an independent board of directors.' And perhaps the case of *Eley v. Positive Life Assurance* (noted at p. 28) might well be incorporated in the difficult topic of contracts made before incorporation (pp. 44-45).

The chapter (VI) on the Prospectus is clear and attention is well drawn to the partly true and partly false type of prospectus as illustrated in *R. v. Kylsant*. We would suggest that it would be helpful if the facts of *Peek v. Gurney* were to be set out on p. 58. And in the same chapter, the statement (on p. 54) that 'No action will lie against the company for damages alone, without rescission, because a person cannot obtain damages against a company while he is a member of it' might be made clearer. The chapters on Capital and Shares (IX and X) are clear and adequate, though it might be made clearer that a mortgagee *does* get protection if he serves a notice in lieu of Distringas (p. 114). And we think that the rule in *Foss v. Harbottle* is so important that it deserves a little more explanation and treatment than it receives (p. 164). The chapters on Winding Up (XX-XXIV) are well dealt with and easy to follow.

Dr. Charlesworth has brought this edition well up to date, and we note the inclusion of *Carruth v. I. C. I.* (1937)—(we might add that this case is now available in [1937] A. C. 707)—*Craven-Ellis v. Canons* (1936) and *Re Farrer* (1937). Perhaps *Re Bulmer* [1937] Ch. 499 (on the fiduciary position of a member of the committee of inspection) might have been included. And we think that this edition would have given the author an opportunity of mentioning the Law Reform (Married Women and Tortfeasors) Act, 1935, especially with regard to the liabilities of directors (p. 60).

We are sure that the student will find this a most helpful guide, for throughout the author reveals his experience of teaching this subject, anticipating as he does the points of difficulty which present themselves to a student.

T. C. T.

The Law of Master and Servant. Third edition. By FRANCIS RALEIGH BATT, LL.M., of Gray's Inn and the Northern Circuit, Barrister-at-Law, Professor of Commercial Law in the University of Liverpool. London: Sir Isaac Pitman & Sons, Ltd. 1939. xxxvii and 531 pp. (15s. net.)

THERE is a great deal of law packed into the third edition of this very useful monograph, and we should judge that it has become quite as popular with the practitioner as with the student for whom it was primarily intended. The position of a servant in English law has fluctuated historically from a status composed chiefly of disabilities to a rather miserable sort of freedom under the laissez-faire doctrine in commerce, and back again to a status, but this time to one of fairly sensible protection by the law. Professor Batt's handling of his topic is thorough and all we need do is to make one or two suggestions for the next edition.

We think it would be safer to state the result of *Re Polemis* by the insertion of the word in square brackets in the following statement: 'once a person is found to have been guilty of negligence all [direct] damage which actually flows from the negligent act is recoverable' (p. 272). Nor, we think, is the rule limited to the tort of negligence or to torts in which negligence may be an element. *Valentine v. Hyde* (p. 300) is apt to be a trap unless it is stated that in effect it was overruled by *White v. Riley* [1921] 1 Ch. 1. At p. 283, it is questioned whether a master can sue X for injuring the servant so as to deprive the master of his services, if the servant himself cannot sue X, either because X can plead *volenti non fit iniuria* or because the servant has deprived himself by contract with X of any right of action, e.g. where X is a railway company which has negatived any liability to the servant by the terms of an excursion ticket taken by him. Professor Batt thinks that it can very plausibly be argued that the master can nevertheless sue X. We venture to urge that the argument is not merely plausible but quite sound, for the master's action in tort is (as Professor Batt himself says) quite independent of any that the servant may have (we should add 'or may not have').

In stating (at p. 177) the undoubted rule that the service of a domestic or menial servant can be terminated by payment of a month's wages or by a month's notice, the learned author adds that 'a servant has not the corresponding right of summarily terminating the contract of service by sacrificing his wages for the period of notice'. This is contrary to the statements in Smith, *Master and Servant* (6th ed. 57—58, citing no authority), Macdonell, *Master and Servant* (138) and Eversley, *Domestic Relations* (782); these last two cite *Fawcett v. Cash* (1834) 5 B. & Ad. 904, which is not directly in point. Diamond, *Master and Servant* (190) and 22 Halsbury, *Laws of England* (2nd ed.), § 248, make no express statement. We think that the view of Smith, Macdonell and Eversley is supported by a dictum of Erle C.J. in *Nicoll v. Greaves* (1864) 17 C. B. (N.S.) 27, 34—35, who said that either party might end the relation, and who gave the true principle at the back of the custom. Menial and domestic servants are so constantly about the master's person or his premises that it is highly desirable that either party should be able to put a speedy end to such close proximity and intercourse if they cannot get on with one another. Professor Batt might add that by another custom now recognized, domestic service may be terminated at the end of the first month by notice given at or before the end of the first fortnight (22 Halsbury, *Laws of England* (2nd ed.), § 248).

P. H. W.

Impossibility of Performance in Contract. By RUDOLF GOTTSCHALK, Dr. Jur. Utr., LL.M. (Lond.), of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1938. xvi and 146 pp. (7s. 6d.)

ACCORDING to the learned author, this is the first monograph on the topic. It is a valuable contribution to it as a study in comparative law, but the English practitioner must make his own use of the materials which are here collected rather than adopt some of the conclusions set forth, for they seem in some respects out of touch with the turn of thought of the English lawyer.

Part I is a short historical development of the English decisions from *Paradine v. Jane* (1647) Aleyn 26. The law earlier than that has still to be investigated in detail, for, besides the two cases mentioned at pp. 3—4, there is a considerable number of references in *Williams v. Hide* (1628) Palmer 548. The author's statement at p. 90 that he has already dealt at some length with cases preceding *Paradine v. Jane* is apt to mislead the reader into the idea that a complete history of the law has been given. However, Part I certainly makes apparent the curious variety of pattern in the web of reasoning by which the Courts have introduced exceptions to *Paradine v. Jane*.

Part II is an analysis of Roman law on the subject and a review of some of the English decisions in the light of Roman law. The arrangement might have been neater, for some of the English cases are interpolated in discussion of the Roman law. The statement at p. 81 that 'initial impossibility is treated in English law as a case of mistake as to the existence of the subject-matter of the contract' is too sweeping; see *Thornborow v. Whitacre* (1706) 2 Ld. Raym. 1164; *Levy v. Yates* (1838)

7 L. J. Q. B. 138. It is by no means clear what the author means when he says at p. 85 that he has attempted to solve the problem in English law 'by bringing principles of Roman law into contact with the common law of England'. At any rate his application of the *exceptio doli* to *Tamplin's Case* (p. 78) would have been of no more practical use to the House of Lords in deciding the case than the principles which they actually applied. What help could they have derived from the statement that the *exceptio* would have applied in Roman law 'in certain circumstances where a fundamental change of affairs had taken place'?

Part III contains American views and criticisms of our law, and a useful Appendix includes the rules of the Roman-Dutch, German and French systems.

It may perhaps be too late to deduce some broad principle from the English decisions, but we suggest to Dr. Gottschalk and the readers of the *Journal* that the key to most of the cases is this: supervening impossibility which discharges a contract consists in the occurrence, after the making of the contract, of some event which the Court may reasonably regard as making execution of the contract impossible, or practically impossible; such event being neither contemplated (*pace* Goddard J. in *Tatem, Ltd. v. Gamboa* [1939] 1 K. B. 132) by the contract nor due to the fault of either party to it. 'Reasonably' implies that each case must be judged on its peculiar facts; war, fire, riot, death, illness, legislation and the like may discharge a contract in some circumstances, but not in others. The test is admittedly elastic, but we doubt whether others which have been adopted are any less so. As to the result of supervening impossibility when it is once established, we cannot with discretion say much, for the rule that the loss lies where it falls is under consideration of the Law Revision Committee; but we can at least sympathize with the astonishment which Dr. Gottschalk, as a foreign lawyer, shows at the existence of the rule.

P. H. W.

Introduction to Real Property Law. By J. A. WATSON, LL.D., B.Sc., of the Inner Temple, Barrister-at-Law. Second edition. London: Sweet & Maxwell, Ltd. 1938. xvi, 296 and 31 pp. (15s.)

THE present edition is sixty-two pages longer than the first (although the index is eight pages shorter) and a number of additions and alterations have been made both to the text and to the arrangement. The wisdom of the increase in size is doubtful, since the avowed object of the book is to 'enable the student to read and understand more easily the larger works on the subject'. There is a real danger of the book falling between two stools; it is too long for a short introduction and not detailed enough for an examination text-book. The inclusion of the Inheritance (Family Provision) Act, 1938, and the Leasehold Property (Repairs) Act, 1938, is a sign of an up-to-date book, but the details of these Acts are hardly essential in a 'first book for students'. (Incidentally, there is no mention on p. 125 of the restriction of section 1 (1) of the latter Act to leases with five or more years to run.) They fill three pages, while the four accumulation periods (p. 184) and the rule in *Purefoy v. Rogers* (p. 174)

are each discussed in one sentence with no explanation. (The doctrine of lost modern grant is also dealt with in one sentence, but this is one of the numerous sentences of over a hundred words which the book contains.)

Together with Bramwell B., the author can say in a number of cases, 'the matter does not appear to me now as it appears to have appeared to me then'. In some respects this is an improvement; thus students are no longer told that the remedies for recovery of rent due under a rent-charge apply to rent due under a lease. But the converse is sometimes the case. The adequate description of tacking in the first edition has been replaced by the remarkable explanation now given at pp. 257, 258. Fortunately, the inaccuracy of this passage is rivalled by its unintelligibility and probably little harm will be done.

However, many old faults remain unaltered. The shifting use given as the first example on p. 171 is still a springing use. The early will on p. 197 is still not a will. After pointing out that equity would not relieve against forfeiture of a lease for breach of a covenant other than for non-payment of rent, section 146 of the Law of Property Act, 1925, is still set out without mention of relief (p. 123).

Realty passing under a will is still not held on trust for sale by virtue of section 33 of the Administration of Estates Act, 1925, as p. 199 indicates. It is regrettable that beginners should be told that 'equitable interests only bind those persons who have notice of them and not always them' (p. 39), for volunteers and purchasers of equitable interests are not unknown. Nor is the emphasis on twelve years' possession giving a title good against all the world altogether fortunate (p. 227).

Perhaps one had hoped for too much from this second edition. Some parts of the first edition, such as the historical sketch of Conveyances of Land, could not be improved, and raised hopes that the rest of the book would be brought up to the same level. It is a matter of great regret that a book with many undoubted merits should be marred by these and other flaws.

R. E. M.

The Law Relating to Unincorporated Associations. By DENNIS LLOYD, B.A., LL.B., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1938. xvi and 248 pp. (21s. net.)

THIS treatise was awarded the Yorke Prize at Cambridge in 1937. It is a valuable and scholarly work dealing with the variety of different unincorporated associations (with the exception of partnerships) which exist in English law. After an introductory section dealing with the meaning of legal personality and the legal basis of unincorporated societies, the author distinguishes between four difficult types of such societies; in this part of the book is included much interesting historical information, although only a sketch is given of the history of each type. The reader is rather left with the impression that it is almost impossible to describe or define the history or position of unincorporated societies except by tracing the history and principles of incorporation. The second part of the work deals with the relation between unincorporated associations and the law; this is treated under six headings and contains references to the

case-law upon the subject. From a practical viewpoint this is the most valuable part of the book and the author is to be congratulated on the excellent and lucid manner in which he has dealt with the disjointed material at his disposal. It is perhaps worth remarking that the *Annual Practice* contains much information which is indispensable before an action is brought involving an unincorporated society; in truth the absence of a general body of doctrine applicable to such societies, to which the author refers in the conclusion of his treatise, would be intolerable if it were not for the multiplicity of procedural rules and orders which to a certain extent take the place of general principles. There is a useful appendix on associations in French and German law. In short this is an excellent book upon what is virtually a new subject to most English lawyers.

P. D.

Lectures on Legal History. By W. J. V. WINDEYER, B.A., LL.B., Barrister-at-Law. Published by the Law Book Company of Australasia, whose agents for sale in this country are Messrs. Sweet & Maxwell, Ltd., 3 Chancery Lane, London, W.C.2. 1938. xv and 280 pp. (21s.)

THIS book is based on lectures given by the author in the University of Sydney. I have read it with excitement and enthusiasm. It seems to me to be the first book of its kind that cannot reasonably be said to be heavy-going. In little over a hundred thousand words it contains an immense amount of information, and yet does not read like an epitome.

It aims at giving a conspectus of the main threads of English legal development. This it does effectively, containing much detail with a general sense of pattern. Non-lawyers, whether historians or not, would, I think, read it with pleasure.

Its success is attributable to two facts. The first is to be found in the fourth paragraph of the preface: 'The teacher of legal history is usually convinced that Mr. Pleydell in *Guy Mannering* was right, that "a lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect". But he must heed, too, Dicey's reminder that "Antiquarianism is not law", and select his material accordingly.' The second is its straightforward style, without cumbrousness and purged of almost all redundancy.

It is remarkable that in the space available room has been found for twenty-five pages on the pre-Conquest period, for numerous references to important developments on the continent, and for a short account of the growth of the Australian legal system.

The citations show that Mr. Windeyer has at his finger-tips all the appropriate modern literature: I think that I have seen references to every author who ought to be mentioned, except Ames. (I may have overlooked a reference to him.)

I have only one criticism to make. The long chapter entitled 'Equity and the History of the Court of Chancery' appears as Chapter 32, after Chapter 30, 'Holt and Mansfield' and Chapter 31, 'Blackstone'. All that part of it which deals with medieval equity ought to have been inserted in Chapter 16, 'The Later Middle Ages'. It is essential to a

balanced account of English legal development that when reading of the fifteenth, sixteenth and seventeenth centuries one should realize the importance which the Court of Chancery had already attained, and not wait for that realization until the eighteenth century.

I wish it were possible for this book to be sold at 10s. 6d., and its purchase by every law student throughout the country to be made compulsory.

H. A. HOLLOND.

Le Conflit des Lois en matière des Contrats dans le Droit des Etats-Unis d'Amérique et le Droit Anglais comparés au Droit Français. Par J. BARBEY. Paris: Rousseau et Cie. 1938. 359 pp. (60 francs.)

THE French author, an adherent of the universalistic school in Private International Law, has chosen the English, American and French law of Conflict of Laws in matters of contract as an illustration of the similarity of solutions in different municipal systems. The book is divided into two parts: the first offers an exposition of the English and American rules of Conflict of Laws (capacity, form, essential validity); the second is devoted to a critical discussion of these rules as compared with French Private International Law. The author, who is well read in American and English law, approaches his subject without any prejudices in favour of either the school of Harvard or of Yale, but his independence of thought leads him to over-estimate rather the importance of exceptional cases. His contention that free choice of law is accepted in the United States is still open to doubt. The article by W. W. Cook, (1938) 32 Ill. L. Rev. 899-920, which appeared after the present book had been published, tends rather to open new paths than to expound existing rules. In view of the recent English decision in *Vita Food Products Inc. v. Unus Shipping Co. Ltd. (in Liquidation)* [1939] 1 All E. R. 513, 521, it is interesting to note the author's critical discussion of the American case *Shannon v. Georgia State Building and Loan Ass.* (1901) 78 Miss. 955, introducing the test of good faith as a limitation of free choice of law. In the second part, which is particularly valuable for its lucid comparison of Anglo-American and French Private International Law, the author is led to propose certain changes in French law by introducing the Anglo-American tests in matters of form and by sponsoring, though only to a limited extent, the adoption of the English test of capacity in commercial contracts instead of the French represented by the well-known case of *de Lizardi v. Chaise*, S. 1861. 1. 305. The reviewer hesitates to share the optimism of the author who believes that the rules relating to the law governing contracts are substantially the same in the countries under consideration. Even if this is outwardly the case, difficulties of classification prevent identical results and nothing except a break with the past by accepting factual tests of typification can bring about complete unity. A wealth of information on topics such as evasion of laws, *renvoi*, inter-State and international Conflict of Laws go to make this book one of the most interesting works on Private International Law published during the current year.

K. L.

Bowstead's Digest of the Law of Agency. Ninth edition. By A. H. FORBES. London: Sweet & Maxwell, Ltd. 1938. xciv and 400 pp. (30s.)

THE eighth edition of *Bowstead on Agency* was the last which was destined to come from the hands of its learned author, and Mr. Forbes, who is responsible for the present one, has naturally treated the text of this classic with respect. Five articles have been omitted, a similar number of new ones introduced, and substantial alterations made in about ten others. The illustrations have been revised and improved by the inclusion of all recent decisions, though we miss a reference to the curious case of *Crédit Foncier d'Algérie v. Simpson* (1931) 41 Ll. L. R. 48, where Roche J., as he then was, seemed to lay down that if an agent obeyed the instructions of his principal when he knew that obedience involved a breach of obligation to a third party, he was liable in damages to that third party—a somewhat startling proposition. No mention is made of a position which must arise frequently in practice, the position when a principal accepts a client on terms less favourable than those which the agent was commissioned to offer. In *Harrods, Ltd. v. Geneen* [1938] 4 All E. R. 493, there was a difference of opinion in the Court of Appeal, the majority holding that there was consideration for the variation in the agent's contract of employment, and the result of the appeal to the House of Lords will be awaited with some interest.

The most substantial alteration has taken place in the section dealing with the liability of the principal for the wrongs of his agent, and we feel that more space might have been devoted to the difficulties connected with the tort of deceit, which were revived by the decisions in *London County, etc., Properties, Ltd. v. Berkeley Property Co., Ltd.* (1936) 155 L. T. 190, and *Anglo-Scottish Beet Corp. v. Spalding U. D. C.* [1937] 2 K. B. 607, and were ably discussed by Mr. Devlin in an article on 'Fraudulent Misrepresentation' in 53 L. Q. R. 344. In the cases of 'divided knowledge', the correct view, it is submitted, is that the principal cannot be liable unless the person who knows that the statement is false also knows that it is going to be made to the plaintiff, whether the two persons concerned are agents of the same principal or are principal and agent. But these are minor criticisms, and we feel that Mr. Forbes has emerged from a difficult undertaking with success. Incidentally, the appearance of the book has been much improved by the change in format.

D. W. L.

The Dominions as Sovereign States. By A. BERRIEDALE KEITH. Macmillan & Co., Ltd. 1938. xlv and 769 pp. (25s.)

It is important to have in mind that this work is not a text-book of constitutional law nor written solely for lawyers. The author considers that the time has come when the status of the Dominions can be set forth with a certain measure of assurance that no events in the near future will happen to disturb the essential principles affecting their place in the Empire or Commonwealth. Professor Keith's unrivalled knowledge renders his latest work indispensable to the serious student of imperial

constitutional law. The author discusses first the present status of the Dominions in international law, the effect of the Statute of Westminster on internal sovereignty and the present state of inter-imperial relations. Perhaps of especial value is the reminder that political action always seeks legal reasons to support it, and that although political reasons may be determining, legal arguments seriously meant are entitled to respectful consideration. The second part of the book deals with the government of the Dominions, and the author covers the executive, the legislatures and the judiciary, and provides an admirable account of the problems of federations and the actual part played by the Dominions in regard to foreign affairs and defence. He concludes by a discussion of Dominion mandates and the problems of imperial co-operation. The facts which the author presents enliven his discussions of legal points, though the work would be of much greater value to the law student if more reference was made to views other than those held by the author. Thus it is twice stated that *British Coal Corporation v. The King* disposes of all arguments to the effect that since the Statute of Westminster, if a subsequent Act of Parliament applied *nominatim* to any Dominion, the omission of the requisite statement of concurrence would prevent it applying to the Dominion. The law student should know that at least two eminent constitutional lawyers take a contrary view. Similarly his attention might well be directed in connexion with the relationship between governors and ministries to the views expressed by Mr. Justice Evatt in *The King And His Dominion Governors*.

G. G. R.

Readings in Jurisprudence. Selected, edited and arranged by
JEROME HALL, Professor of Law, Louisiana State University.
Indianapolis: The Bobbs-Merrill Co. 1938. xx and 1183
pp. (\$7.50.)

THIS book contains over two hundred excerpts, averaging five to six pages each, from the works of some hundred and fifty writers on jurisprudence and allied subjects. It is the first attempt, so far as the reviewer is aware, to put such fare before the student, and the editor would be the first to admit that, without some guidance, it might prove indigestible. The discriminating will browse and sample, and where the appetite is whetted, refer to the originals. It is, however, a most valuable book for college libraries containing as it does excerpts from articles which, though classic, are not easily accessible and from a range of books wider than that available in most law libraries.

It is in no sense a case-book, and the readings do not cover such topics as ownership or negligence where cases are most appropriate. Yet a number of cases are included, illustrating analogy, law and custom, and idealism in the judicial process. Arrangement has obviously been a problem, but this has been skilfully dealt with. In Part One—Philosophy of Law—readings are grouped under the different schools: Natural Law, Historical Jurisprudence, and so on. In Part Two—Analytical Jurisprudence—the sub-headings are Logic and Law, the Nature of Law, Terminology and Basic Concepts, the Syllogism, Analogy, Classification, and Formal Science. In Part Three—Law and Social Science—they

include Science and Scientific Method, the Nature of Social Science, Social and Legal Institutions, Social Control—Non-legal and Legal, the Judicial Process, and Methods of Research.

The mere enumeration of these headings draws attention to the width of the American conception of jurisprudence and to the immense progress that has been made in American Law Schools in utilizing modern scientific and logical technique in the treatment of age-old jurisprudential problems. A thorough overhaul of the methods by which the problems of jurisprudence are traditionally approached is long overdue in this country, and one may be permitted to hope that some of these readings may stimulate activity in this direction. In this connexion it is interesting to note that M. R. Cohen is allotted the greatest amount of space, but Pound is not far behind. Maine, Holmes and Cardozo receive their due, while modern British writers are represented by McIver, C. K. Allen, and Professors Goodhart and Ernest Barker.

B. E. K.

The World Crisis. By the Professors of the Graduate Institute of International Studies. Longmans. 1938. xii and 385 pp. (10s. 6d. net.)

THIS is a volume of papers on various aspects of international relations written by professors of the Institute. It is divided into three sections dealing respectively with political and historical problems, legal problems and economic problems. One essay by M. Paul Mantoux discusses the lost opportunities of the League. M. Rappard writes on the contribution of the League to the principles of international politics. M. Bourquin dwells upon the crisis of democracy, and M. Ferrero on forms of war and international anarchy. Mr. Pitman B. Potter ends the section on political problems with a study of the present crisis in international organization. Legal problems are discussed by Professor Kelsen, Professor Wehberg, Professor Guggenheim and Dr. Kaeckenbeeck. Professor Kelsen's article on separation of the Covenant from the Peace Treaties is severely analytical. He favours such a separation if only for technical reasons. Professor Wehberg's article on Civil War and International Law contains much food for thought. His conclusion is that the customary law of nations does not regulate the matter: it is primarily a matter for international collective action under the Covenant. Professor Guggenheim in his article on legal and political conflicts in the League of Nations is chiefly concerned with reforming the Covenant. Dr. Kaeckenbeeck is an authority on the work of the arbitral tribunal of Upper Silesia. His contribution is of great practical interest. The third section, on economic problems, is disappointing. Herr Ludvig v. Mises writes on the disintegration of the international division of labour; Dr. Röpke on international economics in a changing world; Professor Whitten on peaceful change and raw materials (he favours an international code of fair practices) and Professor Heilperin on monetary internationalism and its crisis. The list of the publications of the contributors given at the end of the volume is the most useful addition.

J. M. J.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831—1860. Vol. IX, Mexico. Selected and arranged by WILLIAM R. MANNING. Washington, D.C.: Carnegie Endowment for International Peace. 1937. xlv and 1251 pp. (\$5.)

THERE is some danger that the bulk and the regular appearance of this series may react unfavourably on the appreciation of its importance for the history of international law and diplomacy. The first part of the series, namely, that dealing with the attitude of the United States towards the independence of the Latin-American Republics in the formative period of their existence, constitutes, together with the two volumes recently edited by Professor Webster and covering the British attitude, a significant contribution to diplomatic history and, in particular, to the question of recognition of States. The second series, of which the present volume is one, covers the period 1831—1860. It throws instructive light on such questions as recognition of governments, hostile expeditions in connexion with revolutionary movements, boundary disputes, and the like. The principal feature of the present volume is an account of the policies of the United States and—to some extent—of Great Britain in regard to the Mexican revolution of 1858. The recognition, on the part of the United States, of the constitutionalist government driven out from the capital and the eventual withdrawal by Great Britain of her recognition of the insurrectionary government established in Mexico City are described in hitherto unpublished documents and dispatches of considerable legal and historical value. There are few publications of this nature, in the United States or elsewhere, which from the point of view of thoroughness and completeness approach the series edited by Dr. Manning. In comparison with it *Moore's Digest* is a mere selection. It is very much to be hoped that the learned editor and the Carnegie Endowment will continue to put at the disposal of the historian and the international lawyer material of the same value and interest.

H. L.

Cripps on Compensation. Eighth edition. By ROBERT ABERCROMBY GORDON, M.A., LL.M., K.C., a Bencher of the Inner Temple. London: Stevens & Sons, Ltd. lxxvi and 991 pp. (£2 15s.)

THE eighth edition of this standard work has, like the seventh edition published in 1931, been edited by Mr. Gordon, and he is to be congratulated upon the care and completeness which mark his work. The book has become almost an essential guide to those who practise in compensation cases or find it necessary to consult the many Acts of Parliament under which cases for compensation now arise out of compulsory powers for the acquisition of land. The chapters on Housing and on Town and Country Planning have been re-written and a new and valuable chapter has been added upon the Restriction of Ribbon Development Act, 1935, as amended by the Trunk Roads Act, 1936. Space has been found for a large number

of useful forms and for the Rules made under the Acquisition of Land (Assessment of Compensation) Act, 1919; the Board of Education (Compulsory Purchase) Regulations, 1933; the Small Holdings and Allotments (Compulsory Purchase) Regulations, 1936, and the Housing Act (Extinguishment of Public Rights of Way) Regulations, 1937.

Means have also been found for including full reports of two valuable cases which hitherto have not been very readily available, namely, *Metropolitan Ry. and Metropolitan District Ry. v. Burrow*, decided in 1883 and 1884, and Lord Shand's award (given in 1892 in Edinburgh) in *The Princes' Street Gardens Arbitration*. Several useful unreported decisions of the Divisional Court have been included from the notes of Sir Hugh Webster, the senior Official Arbitrator.

R. M. MONTGOMERY.

Palmer's Company Law. Sixteenth edition. By A. F. TOPHAM, K.C., Benchers of Lincoln's Inn, and A. M. R. TOPHAM, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1938. clii and 762 pp. (25s. net.)

THE merits and the usefulness of this work are so generally recognized that the reviewer with the new *Palmer* on his desk need concern himself only with the details which distinguish one edition from another. It need hardly be said that Mr. Topham, K.C., and Mr. A. M. R. Topham (the editors who were responsible for the two previous editions) have again brought the volume up to date in an extremely efficient manner.

However, some of their more substantial alterations call for comment. They have had to find room for many extra pages on winding up, chiefly for voluntary winding up, and have therefore made four chapters out of the former chapter on the subject. Under this scheme, Reconstruction and Amalgamation become a chapter instead of being a couple of sections.

This is necessary although the practising lawyer will be tempted to ask whether it is also necessary to offset these extra pages by referring to precis instead of the usual verbatim sections of the Act. Presumably the answer to him is that the Act is printed in full in the Appendix and that this volume is designed for the business man as well as the lawyer. The rest of the required space has been gained by rearranging and amalgamating certain other chapters. The only matter which appears to have got lost in the process is the chapter which formerly dealt with Conveyances. Even that may have been inserted somewhere, although the word is not to be found in an otherwise comprehensive Index.

We look forward, in due course, to yet another edition by these editors. They, who refer to a long and generous list of cases, ought then to include *Sharpe v. Tophams, Ltd.*, decided too late for this edition, being reported in [1938] 4 All E. R. 12.

PATRICK DEAN.

Private International Law. Second edition. By G. C. CHESHIRE, D.C.L., M.A. Clarendon Press. 1938. lxxii and 692 pp. (25s.)

WHEN Dr. Cheshire's work was published in 1936, we foretold with some confidence that it would speedily be recognized as the leading text-book for students commencing the study of the subject. His clearness of exposition, coupled with appropriate illustrations of the leading principles, has commended the work to all who have the task of advising students on their reading; and the independence of his approach to many of the debateable doctrines put forward by previous writers is such as to encourage the student to think for himself and investigate the foundations on which such doctrines are supposed to rest. We therefore welcome this early appearance of a new edition as evidence of well-merited appreciation of a good book, and, although we regret the inevitable increase in bulk, we recognize that in some respects it is an important advance on its predecessor. With much of Dr. Cheshire's criticism of English decisions we are in agreement, particularly his criticism of what may be termed the *Renvoi* cases (pp. 45—67) and of the doctrine supposed to be established by *Machado v. Fontes* with regard to foreign torts (pp. 297 *et seq.*). We regret, however, to find him abandoning the theory of acquired rights, which, although subject to limitations which have been clearly and concisely indicated by Dr. Cheshire himself in his first edition, does furnish a reasonable and workable basis for the recognition of claims involving foreign law. The line of approach of Anglo-American Courts to such questions is so different from that of Courts administering Codes that English jurists should hesitate long before being swayed by any wind of doctrine emanating from the Continent.

D. T. O.

Pilgrimage of Grace. By WILLIAM BLISS. London: H. F. & G. Witherby, Ltd. 1938. 213 pp. (8s. 6d. net.)

A CANDIDATE at the Bar Examination, when he was asked to give the rule in *Shelley's Case*, is said to have replied that he did not know, but thought it had something to do with poetry. When the present volume came into our hands we had a vague idea, before perusing it, that it had come to us as relating to the rising in Henry VIII's reign consequent on that monarch's anti-Roman legislation and that it would involve some renewal of former studies of the Statute of Uses. We have been pleasantly disabused of this erroneous impression and we strongly recommend would-be readers not to be dismayed by the title. The book is composed of a most interesting collection of reminiscences of the author's boyhood at Oxford in the seventies of the last century and of his experiences as an articled clerk and solicitor in London at the end of the last and the early part of the present century. It also contains some interesting references to life at that period in Rome, where his father was employed at the Vatican Library, and Ireland, which he had frequently to visit in a professional capacity. It is a volume of recollections which will appeal particularly to lawyers as a record of a professional man's impressions of life fifty years ago.

D. T. O.

The Law of Hire-Purchase. Second edition. By W. G. EARENGEY, a Judge of County Courts. London: Stevens & Sons, Ltd. 1938. xl and 312 pp. (21s.)

THE changes made in the law of Hire-Purchase by the Act of 1938 have made a new edition of this book necessary, but the task of producing it has been complicated by the fact that not all hire-purchase agreements are affected by the new legislation. The author has therefore stated the principles applicable to agreements generally, and then dealt with the modifications introduced by the Act, indicating the various sections by the use of heavy type. The text of the Act itself is to be found in the Appendix, together with the author's observations and interpretations, and precedents of hire-purchase agreement are also given. Perhaps in the next edition there might be some uniformity in giving the dates of cases in the footnotes, though this defect impairs the appearance of the book rather than its value. The passing of the Act has resulted in a number of new publications on Hire-Purchase, but Judge Earengay has the advantage of having been in the field before most of his competitors, and his second edition will be a serious rival to all other works on this subject.

D. W. L.

Lawyers and the Promotion of Justice. By ESTHER LUCILE BROWN. New York: Russell Sage Foundation. 1938. 302 pp. (\$1.)

THIS book can best be summed up by adapting the last line of that limerick which cost a certain chocolate firm so much—'It's handy, it's good, and priced low'. It contains in compact form much information about the problems of the legal profession in the United States, and it can be bought for the modest sum of one dollar. Some of the material is not original, but as Miss Brown has drawn on periodicals which, for the most part, are not available in this country, we are grateful to her and to the Russell Sage Foundation which has financed her research. The problems of American legal education differ widely from those which face us in this country, but it is interesting to note that American teachers are trying to co-ordinate the study of the law with contemporary developments in politics, economics, medicine and science, while we are discussing whether or not Roman Law, Legal History and Philosophical Jurisprudence shall be included in the syllabus. The methods by which the profession is recruited and disciplined in America are not of direct importance to English lawyers, but when the author deals with attempts to remedy defects in the administration of justice, she is treading on ground common to both countries. In particular, her description of the office of Public Defender, as it exists in Los Angeles and other large towns, and of what has been done towards providing legal service for persons of moderate means, shows that America has started to tackle problems which are as yet untouched in this country. In spite of certain defects in its arrangement, the book is an admirable one which can be recommended to those who are interested in the position of the legal profession in modern society.

D. W. L.

Hood and Challis's Property Acts. Eighth edition. By J. H. BORASTON, M.A., B.C.L., of the Inner Temple and Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1938. cxxxii and 980 pp. (£1 10s. net.)

SINCE the last edition in 1909, the law of property has been entirely recast, and so has *Hood & Challis*, but the alterations and additions have been so skilfully done that they preserve the style and characteristic qualities which made the earlier editions so popular and almost indispensable. Although the notes of the last edition are preserved so far as they are relevant, some three hundred pages of new material have been added, and extremely well done. Here we have the text of all the Acts—Property, Settled Land, Trustee, Administration of Estates, Land Charges, Married Women's Property, Law Reform (Married Women and Tortfeasors), together with appendices of Acts and Rules bearing upon them. The notes to the Acts and the Schedules are comprehensive with a wealth of cases, several of which were decided in 1938, and they are up to date in every way. The view that *Gosling v. Woolf* [1893] 1 Q. B. 39 cannot be supported (7th ed. p. 16) has now been abandoned at p. 113. There are long and detailed notes, among others, on sections 44–5, 78, 93, 101, 140–1, and 146, L. P. A.; likewise sections 1, 20, 65–67 of the S. L. A. We have tried out various sections, and on no occasion have we been disappointed with the notes. The work is extremely useful, accurate, comprehensive and inexpensive.

T. E. L.

Annual Survey of English Law, 1937. Published for the London School of Economics and Political Science by Sweet & Maxwell, Ltd. London. 1938. xxxix and 419 pp. (10s. 6d.)

THIS volume, like its predecessors, is the joint work of the members of the School, and it maintains their high standard in comprehensiveness, accuracy, clarity and conciseness. The synopses of various articles in legal journals of this and other countries are extremely useful, and the critical account of some of the cases is most stimulating. Constitutional Law and Administrative Law occupy sixty-seven pages and here we note the Regency Act, the Ministers of the Crown Act, and a crop of appeals from Canada, and some more cases on 'natural justice'. Under Family Law and Persons there is a good summary of the Matrimonial Causes Act. Property and Conveyancing take twenty-seven pages, and we note the Trade Marks Act and a number of important cases on restrictive covenants, settlements and trusts. Contract covers twenty-six pages; Tort, thirty-four, and the main cases deal with public policy, quasi-contract, negligence, master and servant and defamation. There is a very able summary of *Rose v. Ford*. Mercantile Law takes forty-eight pages; Industrial Law and Evidence and Procedure take twenty-five each. The gold clause cases take up much of Conflict of Laws. Public International Law occupies forty-eight pages of which thirty-six deal with International Conventions and Documents.

T. E. L.

The Law and Practice of Land Registration. By J. G. FEARNLEY SCARR, M.A., LL.B. (Cantab), of Lincoln's Inn, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1938. xix and 239 pp. (21s.)

THIS book will be welcomed by students who find the standard comprehensive works on Registration too long, and by the country practitioner who is now faced with an increasing number of registered titles. Here they can learn or revise the leading principles and find the appropriate forms and procedure. They are warned about 'overriding interests'—registration of title has not done away with investigation of title off the register. Nineteen cases are quoted, of which twelve are pre-1926, so there does not appear to have been much litigation on the Act of 1925. A reference might perhaps have been made to *Chowood, Ltd. v. Lyall* (No. 2) in the Court of Appeal, [1930] 2 Ch. 157, and to *Re Chowood's Registered Land* [1933] Ch. 574. The subject is thoroughly well tackled, and the book should prove extremely useful for students and practitioners.

T. E. L.

An Introduction to Equity. By GEORGE W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1938. xxx and 242 pp. (17s. 6d. net.)

PROFESSOR KEETON deserves our congratulations upon his very successful explanation to the beginner of the scope of the chief general equitable principles underlying some branches of equity jurisdiction. He covers the ground by dealing in a lucid and attractive manner with the meaning of equity and its growth, its relation to law, its maxims, the assignment of choses in action, conversion and reconversion, election, satisfaction and performance, ademption, and rectification. The chapter on the relation of law to equity is of outstanding merit; it contains a close analysis of the effect of the Judicature Act, particularly on agreements for leases, licences and concealed fraud. The treatment of Assignment of Choses in Action is admirable, and the question whether consideration is necessary for an equitable assignment is thoroughly discussed in the light of conflicting cases.

T. E. L.

Cockle's Cases and Statutes on the Law of Evidence. Sixth edition. By CHARLES M. CAHN, B.A., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1938. lx and 600 pp. (18s. 6d. net.)

THE previous edition was reviewed in Vol. V, p. 154, of this journal, and few changes of major importance in the Law of Evidence had taken place when the present edition was published. *Maxwell v. D. P. P.* has

become a leading case, and due prominence is given to *Woolmington v. D. P. P.* Some of the older cases are supplanted by more recent ones, *Gilbey v. G. W. Ry.* (1910) by *Lloyd v. Powell Duffryn Co.* (1914), *R. v. Geering* (1849) by *Makin v. Att.-Gen. for N. S. W.* (1893), and *R. v. Schama* is relegated to the notes. About thirty new cases are added and an equal number of the older ones are omitted. Some ten new statutes are included and also the Judges' Rules as to the taking of statements by police officers. The tenth edition maintains the high reputation of its predecessor for its excellent arrangements, its accuracy and thoroughness.

T. E. L.

A Manual of Farm Law. By N. H. MOLLER, M.A., LL.M. (Cantab.), Barrister-at-Law. London: Stevens & Sons, Ltd. 1938. xliv and 528 pp. (£1.)

THIS work takes the form of a small encyclopedia rather than that of a text-book. It is designed for the use of the farmer and 'the expert adviser in the countryside'. Some seventy-five titles supply information upon subjects ranging from bees, brewers and eggs to the more obvious topics. The tendency to break up the larger subjects is possibly of doubtful assistance. A general title such as 'Landlord and Tenant' is found to contain a few selected items, excluding many commonly dealt with as part of the subject, these latter being dispersed over a large number of other topics, while it would not appear helpful, for example, that 'impounding' should be dealt with under the heading 'pound' and not as a vital part of the law of distress. In the circumstances this method of arrangement is, perhaps, inevitable, but the impression given is somewhat haphazard. On the other hand the reader will easily find valuable information upon a multitude of matters.

One glaring error should be corrected. At p. 100 what is in substance the headnote of the decision of the Court of Appeal in *Durant & Co. v. Roberts and Keighley, Maxsted & Co.* [1900] 1 Q. B. 629 is set out under the heading 'bailiffs' when that proposition was emphatically rejected upon appeal by the House of Lords ([1901] A. C. 240) in a decision which is correctly cited at p. 131 under the heading 'Contracts'.

In the next edition a stray split infinitive or two might also be eliminated.

R. P. F. R.

For Magistrates and Others. By LEO PAGE, of the Inner Temple, Barrister-at-Law. London: Faber & Faber, Ltd. 1939. 288 pp. (7s. 6d.)

THIS book contains addresses delivered by Mr. Page at meetings of magistrates, probation officers, and other persons interested in social problems. The author is well qualified for such a task. The great merit of Mr. Page's work is that he is not afraid of being too elementary; he realizes that the major defect of many magistrates is that they do not realize the elements of much of their work. With infinite patience he

explains the ideas that should animate juvenile Courts, the probation service, and the futility of ill-considered and ill-informed sentences. Every student of this topic knows that these things are worth saying: they must be said over and over again until they are accepted as commonplace. The worst kind of magistrate is perhaps not likely to read this book, despite Sir Samuel Hoare's commendation in the Preface. There is, however, some hope that an instructed public opinion will eventually influence the most ignorant, but the price of waiting may be too high. In one sense this is a remarkable book. It can be regarded as the most damning charge against magistrates that has yet been published, although I doubt whether the author intended this or would approve of this interpretation. By setting out some of the things that magistrates ought to know, and by showing that so many magistrates do not realize these things, Mr. Page really convicts some benches of gross offences against humanity. The last chapter expresses the view that improvements are necessary, and that these can best be made by magistrates themselves. To judge by the circulation of matter printed primarily for magistrates, and by membership of the Magistrates' Association, few magistrates take the trouble to educate themselves. Mr. Page will doubtless increase the number of enlightened magistrates, but I fear there will remain a hard core of incurable habitual offenders sitting on many benches.

R. M. J.

The Law relating to Competitive Trading. By DOROTHY KNIGHT DIX, B.A., London University; and of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1938. xx and 224 pp. (15s. net.)

A GLANCE at the contents of this monograph stimulated the reviewer to read much more of it and he put it down with the conviction that it is not likely to accumulate any dust on his bookshelves. It does not profess to deal with the criminal law relating to the subject, and on the civil side it is confined to the current law and is divided into four Parts—Trade Interference, Price Maintenance, Competition at the Hands of Former Employees, and Detriment to Goods and Trade Reputation. By far the most original Part is that on Price Maintenance. The learned author's exposition of this modern form of trade rivalry is clear and attractive—all the more so, because she hints at the conflict of economic theories which is at the back of it. She resisted the temptation to enlarge upon this aspect of the topic because the Courts have proclaimed that they are no judges of the disputes of economists. In fact, however, they must and do take account of competing ideas in such matters, albeit they are unconscious of so doing.

One may not always agree with Miss Dix's conclusions, *e.g.* her attempted reconciliation of *Pratt v. B.M.A.* [1919] 1 K. B. 244 with *Thompson v. B.M.A.* [1924] A. C. 764, or her acceptance of Lord Dunedin's opinion of what *Quinn v. Leathem* [1901] A. C. 495 decided. But she pretends to no dogmatism, and there are several cases in this branch of the law on which a man, if he were learned, might write a book and, if he were wise, might add on the last leaf, 'Well, I don't know'.

P. H. W.

World Court Reports. A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice. Edited by MANLEY O. HUDSON with the collaboration of RUTH BACON. Vol. III (1932—1935). Washington, D.C.: Carnegie Endowment for International Peace. 1938. 549 pp.

THE third volume of Judge Hudson's most useful collection of judgments and opinions of the Permanent Court of International Justice includes such important cases as the *Legal Status of Eastern Greenland*, the *Oscar Chinn* case between Great Britain and Belgium, and the *Lighthouses* case between France and Greece. The cases are preceded by convenient summaries and bibliographies. It is to be hoped that the Collection, which, like very many others, owes its existence to the Carnegie Endowment for International Peace, will become a permanent feature of the activities of the Endowment.

The International Protection of Literary and Artistic Property. By STEPHEN P. LADAS. Vol. I, International Copyright and Inter-American Copyright; Vol. II, Copyright in the United States of America and Summary of Copyright Law in Various Countries. New York: The Macmillan Co. 1938. 1273 pp. (36s.)

THIS monumental treatise is of obvious interest to the practitioner and the specialist. It is also of considerable usefulness for the student of international co-operation and administration. For a substantial part of the work is devoted to a description and analysis of the work of the International Copyright Union. The author deals in detail with the origin and history of the Union, its organization, the relation of the principal Convention of the Union to bipartite treaties on the subject, and the works protected by the Convention. There are also interesting chapters on the relation of the Union Convention to municipal law and on the duration of copyright. (It appears that Portugal is the only country in the world in which the right of the author is protected in perpetuity.) In Part II the author gives an exhaustive account of such questions as the exclusive right of translation, performing rights in dramatic and musical works, musical copyright in mechanical musical instruments, cinematographic works, radio broadcasting and articles in newspapers and periodicals. He devotes considerable space to the difficult question of lawful borrowings or fair uses. There is also a constructive chapter on the future developments in international copyright. The second volume gives an account of the law of copyright in the United States and, with less detail, in other countries. The Appendices include the Berne, Berlin and Rome Conventions, the Pan-American Conventions, the United States Copyright Acts, and a bibliography of twenty pages. There is a detailed Table of Cases bearing on copyright and decided in various countries. Dr. Ladas published several years ago an important work on

The International Protection of Industrial Property. By the present treatise he has greatly added to an already high reputation for conscientious scholarship.

The Wal Wal Arbitration. By PITMAN B. POTTER. Washington, D.C.: Carnegie Endowment for International Peace. 1938. 182 pp.

PROFESSOR POTTER was one of the arbitrators appointed by the Emperor of Abyssinia to settle the Wal Wal frontier incident under Article V of the Treaty of 1928 between Italy and Abyssinia. He describes the case as 'an illuminating clinical study in the organization and practice of arbitration and in the organization and practice of pacific settlement in general'—an opinion which may not command general assent in view of the extraordinary circumstances of the proceedings. But most will agree with Professor Potter, who *pars magna fuit*, that the decision of the Commission absolving both parties from direct responsibility for the incident was in itself a victory for orderly procedure inasmuch as it acquitted a weak defendant of a charge pressed vigorously and unscrupulously by a powerful plaintiff. The victory was not a final one, but the unanimous decision of the Commission remains a fact of both historical and legal significance. The volume, which is preceded by a restrained but certainly not ambiguous introduction by Professor Potter, reproduces the various documents connected with the initiation and the progress of the proceedings of the arbitral Commission.

International Survey of Decisions on Labour Law, 1936—1937. Geneva. 1938. 581 pp. (10 Swiss Francs.)

THIS Series, which is now well established, reproduces digests of or extracts from decisions on labour and industrial law given by the Courts in Germany, France, Great Britain, Italy, and the United States. The Series has abundantly proved its usefulness not only for the comparative study of the law of master and servant, but also for the purpose of the various labour conventions concluded under the auspices of the International Labour Organization. The contributions from Germany and Italy are not only of considerable political and sociological interest; in many cases their legal value from the comparative point of view seems to be unaffected by the special structure of totalitarian legislation and administration of justice. It is to be hoped that there will be no curtailment of this aspect of the work of the research section of the Organization. An Index less rudimentary than those in the present and in the preceding volumes would greatly enhance their usefulness.

Bibliographie du droit des gens et des relations internationales.

By Professor KARL STRUPP. Leyden: A. W. Sijthoff. 1938. 521 pp. (12 Dutch Florins.)

THIS book of reference consists of two parts. The first contains analytical reviews of more important works on international law which have appeared in the last eight years. The second includes systematically arranged bibliographies of international law in various countries, with short indications of their contents. That relating to Great Britain has been prepared carefully and fully by Dr. Schwarzenberger. The entire work is one which required a great deal of conscientious planning as well as painstaking labour in its execution. Those who are acquainted with Professor Strupp's contributions to international law—and there are few who are not—will know that a work of this nature, prepared under his direction and largely written by himself, must be of inestimable value for students. It is indispensable in any library of international law.

Payne's Carriage of Goods by Sea. Fourth edition. By JOHN SAMUEL, M.A., of the Middle Temple, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1938. xxiv and 157 pp. (8s. 6d. net.)

A NEW edition of this very useful students' text-book, first published in 1914, was long overdue. The main features of the new edition are, the incorporation into the text of the Carriage of Goods by Sea Act, 1924, and the addition of references to the *English and Empire Digest* and to *Halsbury's Statutes*. This will enhance its value even to the practising commercial lawyer, but we believe that it would help the student if the facts of more of the cases were given in the text. The subject has its difficult problems, but they are clearly explained and discussed, and the principal changes during the past fourteen years are duly noted. In an appendix of thirty-six pages we have forms of bills of lading and of charterparties, the main sections of the principal statutes on the subject, the York-Antwerp Rules, 1924, and an account of the Commercial Court.

T. E. L.

Les Assises Patrimoniales de la Famille Anglaise; les 'Family Settlements'. Par ANDRÉ BERTRAND. Publications de l'Institut de Droit Comparé de l'Université de Paris. Paris: Rousseau et Cie. 1938.

THIS is an academic thesis, the subject of which sufficiently appears from its title. The writer has taken his difficult task as seriously as it deserves, and has in consequence found it necessary to write, and has written, a by no means superficial sketch of the history of the English law of real and personal property from the Conquest to January 1, 1926. The writer of this note confesses to having found real intellectual pleasure in

reading accounts, written from a Continental standpoint; and in the best tradition of French exegesis, of such matters as the Settled Land Acts, the powers of a tenant for life, and the character and purpose of a trustee for sale.

M. S. A.

Gibson's County Court Practice. By B. PASSINGHAM. London: 'Law Notes' Publishing Office. 1938. xxvii and 200 pp. (15s.)

THIS book, as the author explains in the preface, is intended primarily for the student, and it may be said worthily to fulfil the requirements of a candidate for the Solicitors' Final Examination. That such a publication, dealing, as it does, with the functions and procedure of county courts, is necessary, will be whole-heartedly endorsed by experienced county court officials who have guided the faltering steps of many a newly qualified solicitor. This work gives, in broad outline, the general jurisdiction of the county courts, but does not purport to deal with Workmen's Compensation, Bankruptcy, Admiralty, or the hundred and one Acts of Parliament which make up the courts' jurisdiction; indeed it could not do so and still retain its handy size. It does, however, contain facsimiles of the more common County Court Forms, and this is a useful inclusion.

It should be noted that the Administration of Justice (Miscellaneous Provisions) Bill, 1938, mentioned by the author, has now become law, but the jurisdiction has been increased to £200 only and not to £300.

Gibson's County Court Practice should be obtained by every law student; he (or she) will find it useful and informative, and later on may also find it useful as a guide to a rule or section of an Act in a more advanced work.

J. D. M.

Wills on Evidence. Third edition. By J. D. FINLAISON. London: Stevens & Sons, Ltd. 1938. lxxxiv and 551 pp. (25s.)

It is a curious fact that no major work on Evidence has been produced in this country during the present century. In the absence of new writings, publishers not unnaturally turn to the past, and the result in the present case is another edition of *Wills on Evidence* after an interval of thirty-one years. Much has happened to the law of evidence in that period, and if the difficulty of putting new wine into old bottles is remembered, it will be agreed that Mr. Finlaison has performed his task ably. Some faults have been inherited from the author, for example the treatment of confessions; we have always thought it strange to deal with them in the chapter on privilege simply because they will be excluded if the rules concerning the taking of statements from accused persons have been disregarded. Failure to do more than mention the Judges' Rules on this subject in a footnote must be laid at the door of the editor, for they were

not promulgated till 1912. He has omitted *Woolmington v. D. P. P.*, a decision of the House of Lords, from his discussion of the burden of proof in criminal cases, and has scarcely done justice to the judicial interpretation of the Criminal Evidence Act, which had been in force less than ten years when the second edition was published. But on the whole the work of revision has been well done, and in particular the chapter on the Evidence Act, 1938, is welcome. We think that the present edition will fill a gap in the books on Evidence by meeting the needs of those who want an accurate description of principles without running the risk of being overwhelmed by the mass of detail to be found in longer works

D. W. L.

Some Makers of English Law: The Tagore Lectures, 1937—1938. By Sir WILLIAM HOLDSWORTH. Cambridge: The University Press. 1938. xi and 308 pp. (15s.)

PROFESSOR PLUCKNETT once remarked that 'quite a good deal of the history of the common law could be written in the form of a chronological series of biographies of the leading judges'. In the present book Sir William Holdsworth has improved on this suggestion, for he has not confined himself to judges, but has devoted a considerable space to writers, such as Maitland, whose influence on English law has been as important as that of most men who have sat on the Bench. As the author himself tells us in the Preface, most of the information contained in the book is to be found in greater detail in his *History of English Law*, but the great merit of the present work is that it collects the biographical material and makes it accessible in compact form. We are sure that teachers of Legal History will find this book invaluable in arousing interest in their pupils, and all will agree that it is a worthy companion to the author's *Sources and Literature of English Law*.

D. W. L.

Rent and Mortgage Interest Restrictions. Seventeenth edition. By the Editors of Law Notes. London: Law Notes Publishing Offices. 1938. xxiv and 324 pp. (10s. 6d.)

THE Rent Restriction Acts have received yet another reprieve, this time for four years, through the legislation of 1938. Their scope has been narrowed by the automatic decontrol of houses with a rateable value exceeding £35 in London and £20 elsewhere, but as the remainder of the houses in Class 'B' are now on the same footing as those in Class 'C', there has actually been an extension of immunity from decontrol through act of the landlord. The opportunity was taken to amend the existing law in several particulars; for example, the onus of proving that a house is decontrolled now lies on the landlord, and the period of limitation for recovering overpayments of rent is increased from six months to two years. These changes have necessitated a new edition of the *Law Notes* book on *Rent Restriction*—the seventeenth edition in twenty-three years. The text of the new Act and of the 1938 Regulations has been added, together with

notes thereon, and all the necessary cross-references (so far as we have tested them) have been inserted. Once more we have to express our gratitude to the editors for the speedy and efficient way in which they have given us an up-to-date book on this intricate subject.

D. W. L.

Gibson's Divorce Law. Thirteenth edition (Revised Impression). By A. WELDON and L. C. WARMINGTON. London: Law Notes Library, Ltd. 1938. lii and 269 pp. (15s.)

THE advent of the Matrimonial Causes Act, 1937, has induced the editors of *Gibson's Probate and Divorce* to sever that unholy alliance and to issue separate books on the two subjects, a decision to be applauded. The present work deals with far more than divorce, and perhaps the time has come to indicate that it covers all matrimonial causes. The editors have tried to forecast the probable interpretations of certain obscure provisions in the new Act, and the cases decided since the beginning of 1938, when it came into operation, have generally confirmed their submissions. There is one point on which we would welcome their views. Suppose a foreign woman marries a domiciled Englishman and then either he or she obtains a decree of nullity for impotence or under section 7; does she retain British nationality? The present edition well maintains the standards of its predecessors, in practical value, accuracy and lucidity.

D. W. L.

Les Ordonnances civiles du Chancelier Daguesseau. Deuxième partie: Les testaments et l'Ordonnance de 1735. Par H. REGNAULT. Paris: Sirey. 1938. 372 pp. (70 francs.)

THIS scholarly study in French legal history concerns itself with the codification in 1735 of the law of Succession, which is of particular interest as an instance of a successful attempt to merge the prevalently Roman *droit écrit* of the south with the *droit coutumier* of the northern provinces. All the stages of this difficult enterprise are studied carefully both from the legal and from the historical point of view. A final part is devoted to the working of the *Ordonnance* and to its influence upon the *Code civil* of 1804. The book can be recommended to all interested in the history of French law and of French institutions in the eighteenth century.

K. L.

L'organisation corporative de la France d'ancien régime. Par Fr. OLIVIER-MARTIN. Paris: Sirey. 1938. 565 pp. (80 francs.)

THIS admirably written book deals with the history of the growth and decline of public corporations in France up to the French Revolution.

The wide range of its scope extending to such different institutions as Universities, Inns of lawyers, Royal Academies, corporations of physicians, guilds of craftsmen and of merchants, the French India Company—to mention only a few—and a chapter on the reasons for the abolition of public corporations by the French Revolution make interesting reading.

K. L.

Mexico Labor Controversy, 1936—1938. Memorandum on the Controversy arising out of Mexico's impositions on Foreign Oil Companies in Mexico leading up to the Expropriation Decree of March 18, 1938. 226 pp.

Mexico: Expropriation of Foreign-Owned Oil Properties, 1938. Memoranda, Letters and Diplomatic Notes dealing with the expropriation of Agricultural land and Oil properties of Foreigners in Mexico. 144 pp.

THESE two volumes have been prepared and published by the Standard Oil Company so as to bring the facts of the Mexican oil controversy to the attention of the public. The volumes are well prepared and contain much useful information as to the exact nature of the injuries complained of by oil companies in Mexico. Many interesting questions of international law are discussed and argued in these pages—violation of vested rights, the nature of compensation for such violation, denial of justice by a biased judgment, the local remedy rule and discrimination against foreign-owned property. The question of the nationality of claims in connexion with corporations is also discussed in the correspondence (which is reprinted here) between the Mexican and British Governments. It is believed that no better statement of the American oil companies' case against Mexico will be found than that contained in the memorandum addressed to the Department of State on March 21, 1938, by the various companies interested.

J. M. J.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831—1860. Vol. X, Netherlands, Paraguay and Peru. Selected and arranged by WILLIAM R. MANNING. Washington, D.C.: Carnegie Endowment for International Peace. xxxvii and 913 pp. (\$5.)

THE diplomatic correspondence of the United States with the newly formed republics of Paraguay and Peru forms the major part of this volume. There is useful information to be found in it on the character of the new republics and the special difficulties encountered by American diplomacy in negotiating treaties of friendship and commerce with them. The correspondence with the Netherlands contains little of interest.

J. M. J.

DEL VECCHIO, G.: *On the Statuality of Law*. London: Society of Comparative Legislation, 1937. 20 pp. (reprinted from the Journal of the Society of Comparative Legislation, 1937).

Il problema delle fonti del diritto positivo. Second revised edition. Rome: Riv. Int. di Filosofia del Diritto. 1938. 20 pp.

Sulla involuzione nel diritto. Rome. 1938. 26 pp. (Reprinted from Scritti in onore di Flaminio Mancaleoni and from the Rivista di Filosofia del Diritto, Vol. 18.)

THE author, well known for his publications on Jurisprudence, once again expounds his ideas upon the sources of the law. In his article *On the Statuality of Law* he discusses the position of the individual as a source of law with special regard to International and to Corporative Law.

In *Il problema delle fonti del diritto positivo* he examines the same problem with regard to custom, legislation and case law. His method, sociological and psychological, with a tendency towards the law of nature, may at times arouse the criticism of the reader. The author's originality of thought and vivacity of exposition are always stimulating.

Sulla involuzione nel diritto is an attempt to explain and to generalize the results of Mancaleoni's study on 'L'evoluzione regressiva negli istituti giuridici' in Roman law. Dealing with the retrogression of juridical institutions, the author applies the laws of biology and shows the positive results and merits both of evolution and of decline.

K. L.

DEL VECCHIO, G.: *Ricordando Alberico Gentili*. Second edition. Rome: Casa Editrice Libreria Ulpiana. 1937. 29 pp. (Reprinted from the Rassegna Bibliographica delle Scienze Giuridiche, Sociali e Politiche.)

Giandomenico Romagnosi nel primo centenario della sua morte. Third edition. Rome: Riv. di Fil. del Diritto. 1938. 24 pp.

THE first of these pamphlets contains the results of the author's search for the burial place of Gentilis in London. A few biographical remarks and a bibliography are appended.

Romagnosi (1761—1835), whose learning extended to such diverse branches of knowledge as law, economics, statistics, history of civilization, mathematics and physics, is remarkable for his advanced views on criminal and constitutional law. Del Vecchio shows in this little essay, full of sympathetic though critical reverence, how far Romagnosi anticipated the ideas of Italian lawyers in matters of criminal and constitutional law.

K. L.

DEL VECCHIO, G.: *Riforma del codice civile e principi generali di diritto*. Second edition. Rome: Riv. Int. di Filosofia del Diritto. 1938. 10 pp.

THE problem of *lacunae* in the law is of special importance in codified systems of law. The final draft of a new Italian Civil Code (art. 3 disp. prel.) provides that 'in cases of doubt the judgment must be given according to the general principles of the law in force'. The present Italian Code and the first draft omitted the words 'in force'. (Reference may also be had to art. 23 tit. prel. of the new Peruvian Code of 1936.) The author shows that this omission is fully justified and even advisable. The proposed solution leads to a vicious circle, as the possibility of arriving at a satisfactory conclusion by means of analogy must have failed before art. 3 can be applied, while art. 3 refers back to the rules of analogy. Del Vecchio points out very correctly that a reference to 'general principles of law' does not amount to the introduction of foreign law, though it alludes to a modern *ius gentium*. Moreover, a careful application of the law of nature, far from preventing the evolution of positive law, has always been a most efficient stimulant.

K. L.

Esame del Progetto preliminare del Codice di Procedura civile.
Relazione del Prof. M. RICCA-BARBERIS. Turin: R. Università di Torino, Memorie dell' Istituto Giuridico ser. II, Memoria XXV. 1938. 29 pp.

FOLLOWING the publication of the draft of a new Code of Civil Procedure, the Italian Government has asked the Law Faculties of Italy to express their criticisms. The present pamphlet represents the views of the Faculty of Turin. It is divided into two parts, a general one containing an able discussion of the changes proposed and opposed, and a second part with special criticisms of some articles of the Code. For further information, see Goldschmidt, *Annuario di Diritto Comparato* XIII (1) p. 229.

K. L.

Stevens' Mercantile Law. Tenth edition. By HERBERT JACOBS, B.A., of the Inner Temple, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1938. lxxviii and 694 pp. (10s. 6d.)

Stevens is too well established to call for a detailed review. This edition contains a new chapter on the Construction of Contracts, and all the relevant statutes passed since the last edition are duly incorporated, notably the Law Reform Acts of 1934 and 1935, Air Navigation Act, 1936, Trade Marks Act and the Patents, etc., Act of 1938. Many topics have been expanded and new leading cases such as *Fender v. Mildmay*, *Beresford v. Royal Insurance Co.*, and *Mutual Finance, Ltd. v. Welton* are inserted in the text. The work of revision has been adequately performed.

Death Duties for Students. By G. M. GREEN, LL.B., Solicitor; of the Estate Duty Office, London; assisted by B. L. PURKIS, of Lincoln's Inn, Barrister-at-Law; and of the Estate Office. London: Butterworth & Co. (Publishers), Ltd. 1938. xix, 166 and 11 pp. (7s. 6d.)

It is a great advantage to have the author of the standard work writing to meet the needs of students preparing for the Solicitors' Final Examination. To all but experts, Death Duties are a maze of difficulties, but this introduction will prove an admirable guide. The chapters on Computation and Payment of Estate Duty, and Foreign Elements show how the hardest of topics can be made clear. The whole ground is well covered, there are plenty of examples, and the work is accurate and up to date. No student will overlook the Appendix of Revision Notes.

Principles of Company Law. Tenth edition. By A. F. TOPHAM, LL.M., K.C., Benchet of Lincoln's Inn, and A. M. R. TOPHAM, B.A., of Lincoln's Inn, Barrister-at-Law. London: Butterworth (Publishers), Ltd. 1938. l, 437 and 52 pp. (7s. 6d.)

THE ninth edition appeared in 1934 and the tenth became necessary owing to the Law Reform Acts (p. 52) and the Finance Acts (p. 139). Further, there have been a number of important decisions which settled doubtful points of company law (pp. 117, 158, 214, 256, 270). This book is well known to all who prepare for an examination in company law, and we welcome the appearance of a new and up-to-date edition.

The Workmen's Compensation Acts, 1925 to 1934. With Notes, Rules, Orders, Regulations and Schemes, being the Thirty-first Edition of '*Willis's Workmen's Compensation Acts*'. By W. ADDINGTON WILLIS, C.B.E., LL.B., of the Inner Temple, Barrister-at-Law, assisted by GEOFFREY BARRATT, of the Inner Temple, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 1938. cli, 1,018 and 94 pp. (20s.)

Willis was first published in 1897, and it remains indispensable to all who have to advise on Workmen's Compensation. The authors have maintained the high standard one associates with *Willis*; it is thoroughly up-to-date, and some twenty-four cases reported whilst the book was in the press are included in the Addenda with the appropriate reference to their place in the text. The book is a mine of information; the summaries of cases are models of compression, and the treatment of topics where there is a conflict of authorities is admirably done. The authors deserve our congratulations upon the way in which they have incorporated such a multitude of cases in the text without in any way impairing its clarity.

The Principles and Practice of Compulsory Purchase. By J. IAN HAMILTON, P.A.S.I., A.A.I.; Chartered Surveyor. With a Foreword by H. HEATHCOTE-WILLIAMS, M.A., of the Inner Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1938. xi and 83 pp. (7s. 6d.)

THIS is a short practical guide for property owners and surveyors on a subject which has now become of general and everyday importance. The principal statutes are dealt with and some thirty-six cases. It well serves the requirements of the persons for whom it was designed; a practising lawyer will find it useful but not sufficiently comprehensive.

Probate and Divorce Handbook. By D. PERRONET REES, of the Principal Probate Registry. London: Butterworth & Co. (Publishers), Ltd. 1938. xxxii and 368 pp. (15s.)

A COMPACT and informative book on the practice in non-contentious probate and divorce designed to meet the daily needs of a solicitor. Probate takes 163 pages and Divorce 170 pages; the former has tables of fees and 85 Forms, the latter a very useful section on taxation of costs and 112 Forms. It is extremely well arranged and the reference can be easily found. It is a practical pocket encyclopedia on the two subjects.

Gibson's Bankruptcy. Intended as an explanatory treatise on the Law and Practice of Bankruptcy. Eleventh edition. By ARTHUR WELDON, Solicitor (Honours) and H. J. B. COCKSHUTT, Solicitor (Honours). London: 'Law Notes' Publishing Offices. 1938. lvii and 293 pp. (20s.)

THE lapse of five years has called for a new edition of this standard text-book. By careful rewriting and re-arrangement the present edition has been slightly reduced in its number of pages, and yet all the cases of major importance have been duly incorporated. Like all 'Law Notes' publications, it is accurate, clear and well arranged. It is indispensable to the *Final* candidates, and a handy guide to the busy practitioner.

Company Law. For Commercial Students and Business Men. Including the full text of the Companies Act, 1929. The Companies Clauses Acts, 1845 to 1889. By ALBERT CREW, of Gray's Inn and the Middle Temple, Barrister-at-Law. Fourth edition. By the Author and W. G. H. COOK, LL.D., of the Middle Temple, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1938. xxv, 374 and 39 pp. (7s. 6d.)

THIS book is intended primarily for students preparing for the examinations in connexion with the professions of accountant and secre-

tary, and the company law examinations held by various public examining bodies. We welcome the appearance of the fourth edition, which has been well revised and brought up to date.

The Primordial Functions of Government and the Legal Status of Sovereignty. By W. W. LUCAS, M.A., LL.M., of Trinity Hall, Cambridge, and Inner Temple. With an Epilogue on the Three Functions of the Trinity. Cambridge: Bowes & Bowes. 1938. xix, 110 and xxv pp. (7s. 6d. net.)

THIS work presents an analytical discussion of the functions of Government and the nature of Sovereignty, mainly from the point of view of English law, which may be of some value to students of Jurisprudence, particularly Chapter V. In an Epilogue he carries his investigation further by analogies to be found in the field of Theology. There is a Legal Foreword by Lord Macmillan and a Theological Foreword by Professor Raven.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831—1860. Vol. VIII, Mexico (1831—1848). By WILLIAM R. MANNING. Washington, D.C.: Carnegie Endowment for International Peace. xliii and 1106 pp. (\$5.)

THIS volume contains many hundred dispatches relating to a stormy period in the relations between the United States of America and Mexico, including the revolt of Texas from Mexico and the recognition of its independence by the United States. It is of great value to students of American history, and also contains important materials bearing upon international law.

A. D. McN.

Other books and publications received (some of these will be reviewed in the next issue):—

The Philosophy of Law of James Wilson. By W. F. OBERING. Washington, D.C.: American Catholic Philosophical Association. 276 pp. This is an exposition of the jurisprudential ideas of James Wilson, Associate Justice of the United States Supreme Court, 1788—1798, designed to show the connexion between them and the doctrines of the scholastics. The chapters on 'Civil and Criminal Law' and 'The Law of Nature, International Law' put Wilson's conceptions of the law of nature into particularly bold relief.

K. L.

Die erkenntnistheoretischen Grundlagen der Rechtswissenschaft, Band I. Von Dr. M. SCHWABE. Basel: Verlag Benno Schwabe & Co. 1936. 154 pp. This is an attempt to establish a system of jurisprudence by means of Kantian gnoseology. The Viennese school is attacked, but the parts dealing with the nature and essence of the basic norms (pp. 55, 101, 129, 150) are not entirely satisfactory. K. L.

Rechtsstaat und Wirtschaftslenkung. Von Dr. FR. HAUSSMANN. Basel: Verlag für Recht und Gesellschaft. 1938. 335 pp. *Konzerne und Kartelle im Zeichen der 'Wirtschaftslenkung'*. Von Dr. FR. HAUSSMANN. Zürich und Leipzig: Verlag für Recht und Gesellschaft. 1938. 382 pp. *Rechtsstaat und Wirtschaftslenkung* is a well-documented discussion of the relationship between Law, State and Economics in Germany before and after the constitutional changes of 1933, with special regard to the problem of 'managed economics'. The book is of value to all those wishing to acquaint themselves with present German thought in matters of fundamental constitutional principles and with the attitude of lawyers and economists in matters of interference by the State in the sphere of economics. The second book extends the discussion to the international sphere and limits it to the relationship between States on the one side and Cartels, Combines and Trusts on the other. Special regard is had to recent tendencies in the United States, Great Britain, France, Germany, Switzerland, Japan and Russia. The author has succeeded in writing an instructive and interesting book. K. L.

Conferencias Internacionales Americanas, 1889—1936. Dotación Carnegie para la Paz Internacional. Washington, D.C.: 700 Jackson Place. 1938. 745 pp. (\$4.) This is a useful compilation in Spanish of the Conventions concluded and Resolutions passed by the seven Pan-American Conferences and by the Inter-American Conferences for Conciliation and Arbitration (1928) and for the Consolidation of Peace (1936). It supplements the prior volume 'International Conferences of American States, 1889—1928', published in 1931. K. L.

Recenti indirizzi della dottrina italiana in tema di cosa giudicata. By MICHELE GAETANO DE ROSSI. Modena: Società Tipografica Modenese. 1938. 18 pp. (reprinted from *Archivio Giuridico*, vol. 119).

Kann eine jur. Person oder Personengesamtheit nach dem geltenden italienisch. Recht passives Subject von strafbaren Handlungen gegen die Ehre sein? Von Dr. MICHELE GAETANO DE ROSSI. Stuttgart: Verlag Ferdinand Enke. 1937. 20 pp. (reprinted from *Der Gerichtssaal*, Band 110).

Revista de Derecho y Ciencias politicas. Organó de la Facultad de Derecho y Ciencias politicas de la Universidad Mayor de San Marcos. Vol. II, No. 2. Lima: Seminario de la Facultad de Derecho y Ciencias politicas, Casilla No. 524. 1938.

Tulane Law Review. Vol. XII. New Orleans: The Tulane University of Louisiana. (\$4.00.) Leading articles of interest to us are, No. 3, April, 1938: 'Civil Law Influences on the Development of Civil Liberties', by E. P. DEUTSCH; 'Law Teacher Looks Ahead', by H. W. ARANT; 'Implied

Resolatory Condition for Non-Performance of a Contract', by M. L. MONROE; 'Comparative Aspects of Legal Terminology', by H. C. GUTTERIDGE. No. 4, June, 1938: 'Expropriation of Petroleum Companies in Mexico', by H. P. CRAWFORD; 'Implied Resolatory Condition, etc.', continued—'Symposium on the Proposed Louisiana Mineral Code'. Vol. XIII, No. 1, December, 1938: 'Natural History of the Private Artificial Person. A Comparative Study in Corporate Origins', by C. SUMNER LOBINGER. No. 2, February, 1939: 'Praetor and Chancellor', by W. W. BUCKLAND.

The Arbitration Journal. Vol. II, No. 3, July, 1938. Published by the American Arbitration Association in collaboration with the Chamber of Commerce of the State of New York and the Inter-American Commercial Arbitration Commission, 8 W.40th Street, New York. (\$2.50 per annum.)

The New Commonwealth Quarterly. Vol. IV, Nos. 1, 2, 4. London: Constable & Co., Ltd. (2s. per number.) A review devoted to research into problems of International Justice and Security. We note the following: No. 1, 'Plebiscites and Peaceful Change', by Dr. SARAH WAMBAUGH; No. 2, 'Conditions of International Order', by the EARL OF LYTTON; 'Revision of the Covenant', by Prof. J. L. KUNZ, and articles on Collective Security by Capt. LIDDELL HART and H. BOUCHÉ; No. 4, 'Le Bassin du Danube et la Paix de l'Europe', by Dr. STEFAN OSUSKY.

The Homo Juridicus and the Inadequacy of Law as a Norm of Life. By GEORGIO DEL VECCHIO, Dean of the Faculty of Law, University of Rome. Reprinted from Vol. XI, *Tulane Law Review*, 1937, 503—526. New Orleans, Louisiana.

The Law College Magazine. Vol. IX, May, 1938, No. 1—2. Bombay: Government Law College. (Rs. 3.)

Louisiana Law Review. Vol. I, No. 1, November, 1938. Quarterly publication. Louisiana State University Press. (\$4.50.) This follows the usual pattern of law school reviews—leading articles, editorial, comments, notes on cases, and review. The first leading article is 'The Influence of Civil Law in America', by ROSCOE POUND. We congratulate Louisiana University upon the appearance of its first number, and long may it flourish.

Chicago Bar Record. Vol. XIX, Nos. 4, 5, 6; Vol. XX, Nos. 1 and 2. Published by the Chicago Bar Association, 29 South La Salle Street, Chicago, Illinois.

The Administration of Justice under the Quebec Act. By HILDA M. NEATBY. Minneapolis: University of Minnesota Press. London: Oxford University Press. 1937. 383 pp. (27s.) This study deals with the confusion that prevailed in the administration of law and justice in the Old Province of Quebec in the period between the Quebec Act, 1774, and the Constitutional Act of 1791. The confusion arose not only from racial prejudices, but also from the clash of the English common law with the Roman law of France, and 'the application of an unknown law by untrained men'.

Annotations on Small Loan Laws. Based on the Sixth Draft of the Uniform Small Loan Law. By F. B. HUBACHEK, of the Chicago Bar. New York: Russell Sage Foundation. 1938. lxx and 255 pp. (\$3.00.) Deals with judicial decisions on the validity and interpretation of small loan laws, with a critical analysis of devices employed to evade the usury laws. The work is made possible by the Russell Sage Foundation 'for the improvement of social living conditions in the United States'.

The Law Reports of Palestine, 1934—1935. Selected and edited by Sir MICHAEL McDONNELL, M.A., Chief Justice of the Supreme Court of Palestine. xx and 505 pp. To be purchased from the Government Printer, P.O.B. 507 Jerusalem, and from the Crown Agents for the Colonies, 4 Millbank, London, S.W.1. (£P.1.750 Mils (half pigskin); £P.1.500 Mils (buckram).)

The Sino-Japanese Undeclared War. Chinese Consolidated Benevolent Association, Rhode Island, Providence R.I. May 1938.

The Rotarian. February 1939, p. 31. 'Will your Will Work', by G. T. STEPHENSON, Chicago.

Town Practice for the Tyro. Third edition. By the editors of 'Law Notes'. London: 'Law Notes' Publishing Offices, 25 & 26 Chancery Lane, W.C.2. 1937. viii and 108 pp. (4s. 6d. net.) This book explains in a simple and practical way the common details of procedure in the High Court. Like all 'Law Notes' publications it is accurate, up to date and extremely readable. The beginner will derive consolation from the words of Lord Atkin in *Evans v. Bartlam* [1937] A. C. p. 479: 'I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court.'

The Bell Yard. Journal of the Law Society's School of Law. Solicitors' Law Stationery Society, Ltd. (2s.) No. 21, May 1938. 'Special Drafting', by R. R. FORMOY; 'Inevitable Accident as a Defence in Trespass', by JOSEPH GOLD, LL.M.

First and Last. Vol. I, Nos. 1 and 2, November, 1937, April, 1938. London: Longmans, Green & Co., Ltd. (6d. per number.)

Introduction Extrait de l'Annuaire des Associations de criminalistes nordiques, 1937. By K. SCHLYTER, President of the Court of Appeal of Malmö, Stockholm. Two year books have now been published by the above association, namely, 1936 and 1937.

World Trade. Journal of the International Chamber of Commerce, June, 1938. 'Fair Play for Foreign Companies. The I. C. C. Model Agreement', by P. BAUDOUIN-BUGNET. London: 14 Queen Anne's Gate.

The Justinian. Vol. VIII, No. 2. 1938. Brooklyn Law School, St. Lawrence University.

Cases and Other Materials on Judicial Remedies from the Forms of Actions and the classical equity practice to the Federal Rules of Civil Procedure. By A. W. SCOTT, Dane Professor of Law in Harvard University, and S. P. SIMPSON, Professor of Law in Harvard University. Published by the Editors, Harvard Law School, Cambridge, Mass. xi and 1309 pp. (\$7.00.)

Traumatic Mental Disorders in Courts of Law. By WILLIAM A. BREND. London: Heinemann, Ltd. 1938. vi and 104 pp. (7s. 6d.)

The Public Health Act, 1936. By H. SAMUELS and PHILIP FORES assisted by DENNIS PUGH. London: Pitman & Sons, Ltd. 1938. lii and 499 pp. (30s.)

The British Year Book of International Law, 1938. Oxford University Press. vi and 316 pp. (16s.)

The Law of Fiduciary Relationship. Second edition. By ERNEST VINTER. London: Stevens & Sons, Ltd. 1938. xx and 415 pp. (21s.)

Gibson's Conveyancing. Fifteenth edition. By ARTHUR WELDON, H. GIBSON RIVINGTON and J. F. R. BURNETT. London: Law Notes Lending Library, Ltd. 1938. cvii and 766 pp. (£2.)

Cases on Judicial Remedies. By A. W. SCOTT and S. P. SIMPSON. Harvard Law School. Cambridge, Mass. 1938. xi and 1309 pp. (\$7.)

The Principles of English Law and the Constitution. By O. HOOD PHILLIPS, M.A., B.C.L. (Oxon). London: Sweet & Maxwell, Ltd. 1939. xvi and 610 pp. (21s.)

CAMBRIDGE LAW JOURNAL

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THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

Enquiries should be directed to B. F. MENDEL (Trinity), 1 New Square, Lincoln's Inn, W.C.2, the Treasurer of the Bentham Committee, which acts as the executive of the London Council of the Poor Man's Lawyer.

It is regretted that the exigencies of the war have made a reduction in the length of the Journal imperative. In particular, the space available for book reviews has made it necessary to give no more than short notices of many of the works reviewed.

SOME FOOTNOTES TO SALMOND'S JURISPRUDENCE.

A. H. CAMPBELL.

THE following notes are offered in the hope that they may be of some use to teachers and students who are using (as the writer has for some years used) Salmond's *Jurisprudence* as a text-book for the subject of the Nature and Classification of Rights. They do not pretend to be systematic, and they are meant to be supplementary to the excellent and informative notes of Mr. J. L. Parker to the ninth edition. The page references are to the ninth edition; the section references (§§) will serve for earlier editions as well.

The topics annotated are:—

- I.—§ 72. Definition of a Legal Right.
- II.—§ 77. Liability.
- III.—§ 79. The Legal Nature of Rights against the State.
- IV.—§ 81. (a) Real and Personal Rights.
§ 81 and § 80. (b) The relation of these to Positive and Negative Rights.
- V.—§ 82. Proprietary and Personal Rights.
- VI.—§ 83. Rights *in re propria* and Rights *in re aliena*.
- VII.—§ 90. Trust and Beneficial Ownership.
- VIII.—§ 91. Legal and Equitable Ownership, and Legal and Equitable Rights.
- IX.—§ 87 and § 88. Corporeal and Incorporeal Ownership and Corporeal and Incorporeal Things.
- X.—§ 95 and § 105. Corporeal and Incorporeal Possession.

I.—§ 72. THE DEFINITION OF A LEGAL RIGHT.

Attempts have been made to define legal rights in terms of (i) justice, *i.e.*, natural law, (ii) will, (iii) interest, (iv) power. For a selection of definitions see Holland, *Jurisprudence*, 13th ed. pp. 85–6. Salmond (pp. 287–8) defines fundamentally in terms of interest, though on p. 288 he brings in a reference to justice. There are difficulties in all the attempts: (i) a legal right is still a legal right even though the law is unjust, (ii) the

rights of a baby or lunatic can hardly be said to depend on his will in any ordinary sense of the word, (iii) a foolish man of full age has a right (in the sense of liberty or power) to make contracts which are contrary to his interest in any ordinary sense of the word, (iv) the formal validity of law does not depend on its effective observance. Certainly it is of great importance to examine the relation of law to justice, will, interest and force, but for pure analytical jurisprudence these questions are irrelevant; they introduce reference to an extra-legal element. Pure analytical jurisprudence is concerned only with the internal logic of the legal system, and for its purposes a right might be defined simply in some such terms as: The expectation arising out of a rule of law that certain conduct shall or may follow on a given situation.

II.—§ 77. LIABILITY.

To Salmond (p. 304) liability is the correlative of *either* liberty *or* power. It is perhaps a fault in method to use one term thus in two senses.

(a) *Liability as the correlative of Liberty.*—What is the liability correlative to my liberty to walk on my own land or to walk bare-headed in the street? By exercising my liberty I may deprive my neighbour of some of his sense of privacy or offend the sense of decorum of my fellow-citizens, but they have no legal ground of complaint and so may be said to be under a liability to be interfered with by me in these ways. To HOHFELD, however, the correlative of liberty (or privilege) is not liability but *no-right*. My neighbour has no right that I shall not walk on my own land; my susceptible fellow-citizens have no right that I shall wear a hat in the street. This seems to be correct.

Are not such persons under a *duty* to put up with my conduct, because they would commit a wrong by interfering with me? No. As a matter of fact, they can, *i.e.* have a legal liberty to, interfere with me in many ways. They may stare or point or pass comments (so long as their comments are not defamatory or provocative of a breach of the peace). I have a liberty to dress and behave as I like, within certain limits. Others have a liberty to interfere with me, within certain limits. So long as my conduct does not overstep certain bounds and their interference does not overstep certain bounds, we are in a sphere where there are no rights with correlative duties but only liberties with correlative no-rights.

Salmond did see this. Cf. pp. 300—301. But he chose to illustrate it the rather difficult case of a licence to enter land, with the result that his explanation is not as convincing as it might be.

This distinction between the right—duty relation and the liberty—no-right relation is important in trade competition. A trader commits no wrong by selling to any customer he can find (unless he is subject to a statutory marketing scheme) or by seeking to attract new customers by advertisement, unless he has bound himself by covenant not to do so. But these liberties are not necessarily accompanied by rights in the strict sense. Other traders are under no duty to refrain from interfering with his trade by developing their own trade. It is only if they interfere with him by such means as molestation or intimidation of his customers, or by forming combinations which in law amount to conspiracies, or if the man from whom he bought the business covenanted not to set up a competing business and does so in breach of covenant, or if the man from whom he bought the business with its goodwill proceeds to entice away the customers, that a wrong has been committed and a right in the strict sense violated. As KOCOUREK says (*Jural Relations*, 2nd ed. p. 6), my rights are ‘the armour of my freedom’ but the two ideas are juristically distinct. This distinction has not always been appreciated. It has sometimes been thought that because a trader has a ‘right’ in the sense of a liberty to develop his trade he has therefore a right to be protected against *any* interference, at least, unless the interferer can show special reasons to justify himself. *Vide* Lord Dunedin’s speech in *Sorrell v. Smith* [1925] A. C. at pp. 727–8.

Just as my liberty to do something is not necessarily accompanied by a right not to be interfered with in doing it, so my *immunity* (in Hohfeld’s sense) against X’s action is not necessarily accompanied by a right to X’s forbearance. If I am immune (or exempt) from taxation the tax-collector imposes no duty on me by sending me a demand for payment; his action is ineffective; he has *no power*. But it is not necessarily a violation of duty. If, however, he goes farther and arrests me or seizes my property on the ground of my non-payment of the tax from which I am immune, he has now violated a duty of his and a right of mine.

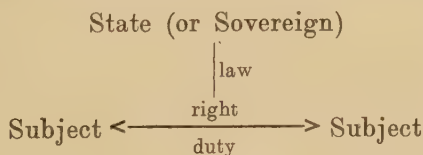
(b) *Liability as the Correlative of Power*.—HOHFELD would use the word ‘liability’ only in this sense. But there appears to be a gap in his scheme. Legal relations may, as he himself says (*Fundamental Legal Conceptions*, p. 50), be changed (i) by

facts which are under the volitional control of a human being and (ii) by facts which are not under the volitional control of a human being. In the first case we say that such a person has power to effect the change, *e.g.* being my agent, he has power to make a contract imposing obligations on me, and the other party to the relation has a liability to have his position affected. But what of the second case? Am I not also *liable* to have my legal position changed by *e.g.* a subsidence on my land which makes it a source of danger to the public, or by the happening of some accident against which I have contracted to insure someone? Hohfeld's professedly complete and systematic scheme finds a place for my liability correlative to a power in someone else but not for my liability to have my legal position changed by events independent of human activity.

KOCOUREK would appear to regard these 'liabilities' not correlative to powers as terms in *contingent relations*, either contingent Claim-Duty relations or contingent Power-Liability relations. Cf. *Jural Relations*, 2nd ed. p. 155.

III.—§ 79. THE LEGAL NATURE OF RIGHTS AGAINST THE STATE (OR THE SOVEREIGN).

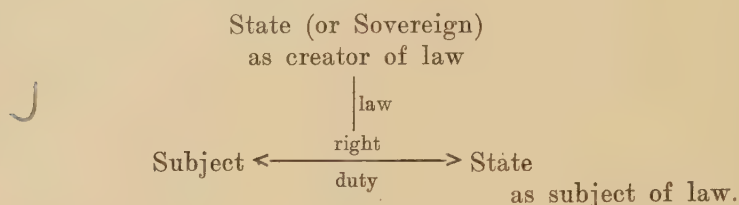
This is a problem only for those who conceive the State (or the Sovereign) as something existing before and above the law and creating the law and therefore say that law is binding only because it is created by or imposed by or 'the will of' the State. Their scheme of thought might be put in a diagram:—



The rights and duties between two subjects are binding because they are created and enforced, through the law, by the State standing over them. How then can there be rights or duties between subject and State? They would need to be created and enforced by something standing over both subject and State and there is no such thing. Are not therefore the relations between subject and State relations of arbitrary force? When the State allows the subject to make a claim against it, is this not a mere arbitrary favour?

But States which allow legal proceedings between subject and State do so according to definite rules. They thus act as

being themselves subject to law. We are forced to the conclusion that the 'State' which is named as party to legal proceedings and is thus treated as subject to the law cannot be the same entity as the 'State' which is conceived as above the law. This we could put in a diagram:—



It is confusing that the same name 'State' should be given to two different concepts, and the confusion is dangerous in practice, because it is apt to lead to the idea that the acts of rulers and officials who are spoken of as acting 'in the name of the State' are the acts of the supreme State which is above the law, and that therefore executive acts cannot be questioned in the Courts. But it is the best that can be done so long as the definition of law as 'the will of the State' is insisted on.

If, however, we do not insist on defining law as 'the will of the State' these difficulties do not arise. Law, whatever be its origin, creates for itself schemes of relations between the entities which it calls persons. One of these persons, the one which is conceived as holding what we may call public rights and duties, may be called the State. But whatever we call it it is clearly the creation of the law and subject to the law. The rules of law affecting it may, of course, not be the same as the rules which would affect private individuals or other private 'legal persons' in similar circumstances, but they are equally rules of law.

English law has on the whole avoided these difficulties because the person it has created to hold public rights and duties is usually called not the State but the Crown. The rights and duties of the Crown may not be the same as those of a private individual in similar circumstances, and in particular the process of enforcement may be different, but they are legal rights and duties.

This raises the interesting question whether my duties to the State (or Crown) created by the rules of criminal law are of the same kind as those created by *e.g.* my entering into a contract with the State (or Crown). Perhaps they are, making allowance for differences of procedure and sanction. My duty

to pay taxes is certainly a 'public' duty, resembling the general or 'public' duties imposed on me by the criminal law, yet the sanctioning procedure may take the form of a civil action brought against me by an official.

Salmond in § 79 takes the view that wherever a right is recognized by the Courts, even though it is unenforceable, it is properly called a legal right, and therefore rights against the State are legal rights. He thus treats the State as subject to the law. But in another place (p. 193) he has said, 'The formal source of the whole body of the civil law is one and the same, namely, the will and power of the State as manifested in Courts of justice', which implies adherence to the view that the State is the creator of the law, and he does not seem to see the necessity of reconciling the contradiction.

IV.—(a) § 81. REAL AND PERSONAL RIGHTS OR RIGHTS IN REM AND RIGHTS IN PERSONAM.

This distinction is stated dogmatically by Salmond (p. 316) in terms taken substantially from AUSTIN's Lecture XIV. Mr. Parker makes some excellent comments (note 213 on p. 321). A fuller account of HOFELD's criticism (*Fundamental Legal Conceptions*, pp. 91 *et seq.*) than Mr. Parker has had space to give might, however, be serviceable. Every legal relation is a relation between two persons only. What appears to be a single relation between A on the one hand and B, C and D on the other is either a single relation between A and (BCD) treated as a single person (*e.g.* joint liability) or it is not one single relation but several co-existing relations, one between A and B, one between A and C, and one between A and D. A as owner of Blackacre has the right that B, C, D and others shall not trespass. It is commonly said that this is a single right which A has against 'all the world'. Not so, says Hohfeld. A single right must correspond to a single duty, and B, C, D and others are not bound by a single duty in the way they would have been if they had *e.g.* jointly made a contract with A. A trespass by C does not affect B. Therefore B, C, D and the others are under several duties and A has as many several rights as there are several duties.

Hohfeld supports this conclusion by the acute observation that even the so-called rights *in rem* are not available against all the world. My right as owner not to be disturbed in my possession of my goods will avail me against many persons, but not against *e.g.* an officer seizing them in execution of judgment.

So Hohfeld concludes that a so-called right *in rem* is a right against one person which happens to coincide with a large number of rights of similar content against other persons and a so-called right *in personam* is one which happens to coincide with few or no other rights of the same content. Instead of the traditional names he proposes the names *multital* and *paucital* rights. The nature of equitable rights obviously presents no difficulty to him. They are multital rights because their holder has similar rights against a large number of persons.

Hohfeld appears to have overlooked an important point. Even if we agree that it is better to speak of several rights correlative to several duties, what we call a right *in rem* is not just one which *happens* to coincide with many other rights of similar content against other persons. A right *in rem* is *presumed* to exist against 'all the world', and therefore against any particular defendant unless he can prove the contrary; a right *in personam* has to be proved to exist against the particular defendant. If I am suing for trespass I need only prove the defendant's entry and he will be held guilty of trespass unless he can show that for some reason, *e.g.* that he had my leave and licence, his entry was not trespassory. But if I am suing on a contract I have to prove not only that I have a contractual right but also that the defendant was the other party to the contract or otherwise has become bound by the obligation of that contract. KOCOUREK, who considers the distinction fundamental (p. 332), not inaptly gives to rights *in rem* the name of *unpolarized* rights and to rights *in personam* the name of *polarized* rights. In the former, 'the essential investitive facts do not serve directly to identify the person who owes the incident duty'; in the latter, 'the essential investitive facts serve directly to identify the person who owes the incident duty'. (*Jural Relations*, 2nd ed. p. 201.)

IV.—(b) § 81 and § 80. THE RELATION BETWEEN REAL AND PERSONAL RIGHTS AND POSITIVE AND NEGATIVE RIGHTS.

The distinction between duties to act and duties to forbear plays a considerable part in Austin, from whom Salmond takes it over together with the use of the word 'negative' for the latter type of duty. To Salmond appears to be due the development that a *right* correlative to a duty to act is to be called 'a positive right' and a right correlative to a duty to forbear 'a negative right'.

But in discussing the relation of this distinction to the distinction between Real and Personal rights (rights *in rem* and *in personam*) Salmond, following Austin, falls into error. He says, correctly enough, on p. 315: 'While liability for hurtful acts of commission is the general rule, liability for acts of omission is the exception.' But on p. 317 he advances, still following Austin, to the dogmatic conclusion: 'All real rights are negative. . . . No person can have a legal right to the active assistance of all the world.' The right of the State that every subject shall pay taxes causes him a momentary hesitation. He reassures himself, however, by deciding that the State has in this matter not one right *in rem* but several rights *in personam* against each subject. If he had pursued this line of thought, he might have eventually arrived at something like Hohfeld's view of rights *in rem*. But he did not.

To the dogmatic assertion of Salmond and Austin that 'No person can have a legal right to the active assistance of all the world' our first rejoinder is, 'Why not?' It may be true that examples of such a right are hard to find in actual law, but a writer on jurisprudence should deal not with what is actually found but with what is juristically possible, and there is no difficulty in conceiving a rule that any one in danger should have a right to the active assistance of any passer-by. The ethical codes of mountaineers and sailors contain such rules. Moreover, such rules are in fact not unknown to English law. Deviation for the purpose of saving life is not a breach of charter-party. *Haynes v. Harwood* [1935] 1 K. B. 146 recognized the moral obligation on all the world to attempt to stop a runaway horse that was endangering life as sufficient to defeat a plea of *volenti non fit iniuria*. We can even find cases where an obligation on all the world to render active assistance is so clearly and definitely recognized that breach of it is a crime. The Maritime Conventions Act, 1911, s. 6 (1), imposes a statutory duty on all persons in charge of vessels to render assistance, so far as they can do so without serious danger to their own vessel, crew and passengers, to every person 'who is found at sea in danger of being lost', and breach of this duty is a misdemeanour. Here the right of the person 'found in danger of being lost' may be called a right *in rem*, because it is available against any and every master of a vessel subject to British jurisdiction who may happen to be in the vicinity. (It must be noted that the duty correlative to a right *in rem* is not necessarily a duty *in rem*, but in this case the duty of the ship-master happens to be *in rem* because it is a duty to any and

every person in danger of being lost.) Salmond might, however, exculpate himself by saying that this was an example of a kind of right which he had admitted as theoretically possible, although he had thought that either it did not exist in actual law or that at any rate it was so exceptional that it might be classed as anomalous, *viz.* a right against 'a particular class of persons', in this case, against persons in charge of vessels. Cf. p. 319. It might be a most interesting argument whether all rights *in rem* are not rights against 'a particular class of persons', *viz.* such persons as may come within the incidence of the correlative duty, but we need not pursue it here, because, even if we abandon this instance, we can find in common law a still clearer example of a positive right *in rem*, a legal right 'to the active assistance of all the world', disregard of which is a crime. A policeman has the right to call on any one to assist in preventing a breach of the peace, and failure to comply is a misdemeanour. Another possible example, although Salmond might treat this as simply a right against 'a particular class of persons', is the right of the road user that every other road user shall exercise care towards him.

We must therefore correct Salmond's statement that 'all real rights are negative' into 'Most real rights are negative, but positive real rights are not inconceivable, and some examples are actually found'.

V.—§ 82. PROPRIETARY AND PERSONAL RIGHTS.

(a) Salmond says (p. 324) that proprietary rights have 'not merely juridical, but also economic significance', whereas personal rights (as opposed to proprietary) have 'juridical significance only'. 'Juridical significance only' is not a well-chosen phrase. It suggests such rights as those of the bare trustee. What Salmond calls my personal rights have more than bare juridical significance. They secure something which is of real value to me—my personal liberty, my freedom from bodily harm, my reputation, my family life, and so on—only the value is (in Salmond's view) not an economic value.

(b) When we consider Salmond's examples of personal rights—'honours, dignities and offices', a man's rights 'as a freeman, a citizen, a husband and a father'—we may begin to wonder if the distinction is as clear as he says. Honours and offices may not be the same thing as, but they are often inseparably accompanied by, official pensions and salaries. Citizenship has perhaps little economic value in modern English law, but in other systems it has. In several modern systems a man's

citizenship or race or membership of the dominant political party is of the utmost importance as affecting the kinds of career he can follow, the kinds of business he can engage in, and his proprietary rights generally. Cf. Mr. Parker's note on p. 329. Until the Married Women's Property Acts an Englishman by virtue of being a husband acquired extensive property rights. The rights of a Roman *pater* to the acquisitions of his children *in potestate* were of definite economic value, and even the rights of an English father to the services of his children may have a certain economic value. The reputation of a business man for honesty or of a professional man for skill may be one of his most valuable assets. And as the capital of an intellectual worker consists largely in his intelligence and knowledge, so does the capital of a manual worker consist in his physical strength. A man's right to freedom from bodily harm may have economic value, as the Courts recognize when in awarding damages for bodily injuries they take into account loss of earning capacity. Even his right to personal liberty has economic value; the freeman able to travel in search of employment has a valuable right which is lacking in the prisoner, the slave or the serf.

The distinction therefore appears to be unreal. Nor is it of practical importance for English lawyers. English law holds that certain rights are not transferable and others are—but not always in the same way or for the same purposes; it holds that certain rights are inheritable and others not; it has rules as to what constitutes a man's estate or assets or property for various specific purposes, *e.g.*, taxation of various kinds, liability to estate duty, liability to seizure for debt, and so on. But Salmond's general distinction means nothing to it. English writers on jurisprudence have an unfortunate tendency to assume that concepts and distinctions which they find in foreign systems, which have evolved them for their own practical needs, must, because they are not English, be of universal validity. Too much of English writing on jurisprudence consists of a desperate attempt to apply the concepts of Roman or continental law to the rules of English law. Salmond indeed tries to have it both ways by collecting and expounding both foreign and English concepts. But he seldom stops to consider whether they are of truly universal validity or even capable of general application.

VI.—§ 83. RIGHTS IN RE PROPRIA AND RIGHTS IN RE ALIENA.

Salmond says (p. 333): 'It must be carefully noted that the distinction between *iura in re propria* and *iura in re aliena*

is not confined to the sphere of real rights or *iura in rem*.' His argument is not clear, but it appears to be based on two points:—

(i) 'Personal, no less than real rights, may be encumbrances of other rights.' In a sense this is true—if I make a contract to sell my chattel, this might be said to create a sort of encumbrance on my ownership of the chattel, even though the purchaser has no claim for specific performance against me nor any claim against persons who acquire the chattel from me—but Salmond has expressly restricted (p. 332) the phrase 'rights *in re aliena*' to such rights as *run with* the encumbered right.

(ii) 'Personal, no less than real rights, may themselves be encumbered.' But the encumbrance is not necessarily itself a right *in personam* because the encumbered right happens to be a right *in personam*. A has a claim of debt against B; A charges this claim in favour of X; A later assigns his claim to C, who may assign to D, and so on. If X's charge does not bind the claim in the hands of C and D, that is, if it does not run with the encumbered right, it is, according to Salmond's doctrine, not worthy of the name of encumbrance. If it does, it is hard to see why it should not be called a right *in rem*. A right *in rem* need not directly and immediately bind 'all the world'. Its characteristic is that it is *contingently* binding on 'all the world'; it will bind any one, no matter whom, who steps into its orbit. My right as landowner that my land shall not be trespassed on is binding on a man at the other side of the world in the sense that if he travels to England and approaches and trespassorily enters my land he will be guilty of a wrong. A right which will bind *any* owner of a piece of property or *any* assignee of a claim of debt (remembering our discussion of rights *in rem*, *supra*, p. 211, we should rather say, which will be presumed to bind, unless this is disproved with regard to the particular defendant) is similarly a contingent right against all the world; it will bind anyone who steps into its orbit. Rights *in re aliena*, running with the encumbered right, should therefore be called rights *in rem*.

The question is somewhat complicated by the fact that, as Salmond points out (p. 332), 'concurrence may exist in different degrees . . . in particular, encumbrances may be concurrent either in law or merely in equity'. But this is merely one manifestation of the general problem of equitable rights. If equitable rights can be called rights *in rem*, then equitable rights *in re aliena* are rights *in rem*.

VII.—§ 90. TRUST AND BENEFICIAL OWNERSHIP.

This, says Salmond, is not the same distinction as that between Legal and Equitable Ownership (§ 91). He points out (p. 357) that an equitable owner is not always a beneficial owner, because he may be trustee of his equitable interest for the benefit of another person. And he adds that theoretically a legal owner might be a beneficiary. Certainly an unencumbered legal owner may be said to have joined in himself both the legal and equitable ownership and also the trust and beneficial ownership. And since 1925 the life tenant of settled land holds the legal fee and also an equitable and beneficial life interest.

Might we not, however, take a wider view and say that all kinds of third-party interests, both legal and equitable, in property, including mortgages, servitudes, restrictive covenants, etc., give, or at least may give, to their holder part of the beneficial interest in the property? If we define ownership as the 'sum total' of rights in a piece of property, shall we not say that the beneficial ownership may be divided up among all the holders of beneficial rights in the property?

The name 'Trust Ownership', which so strongly recalls the equitable doctrine of the trust, seems scarcely suitable as the opposite to Beneficial Ownership. Perhaps Titular Ownership would be better. A may have the ultimate title to property—with the effect that A is the proper person to bring and defend actions against outsiders in respect of the property and perhaps also that conveyances of the property will have to be made in A's name—but the whole of the economic beneficial interest may be vested in B or divided up between B, C, D and other holders of rights, legal or equitable, in the property. It may also happen that A has the ultimate title and B, C and D have legal or equitable rights in the property, but B, C and D hold their rights for the benefit of X, Y and Z. We can therefore make a distinction between 'titular' and beneficial *rights*, of which the distinction between 'titular' and beneficial ownership is merely one example. It must, however, be noted that the holders of the ultimate beneficial rights must have titles, legal or equitable, to their rights; otherwise their rights are not rights known to the law at all. The distinction is therefore between bare 'titular' rights and rights which are both 'titular' and beneficial. Perhaps the simplest form of words would be: Bare Rights (legal or equitable) and Beneficial Rights.

The question of the distribution of economically beneficial interests among the members of the community is of great importance to the economist, but the jurist as such is interested

only in the legal forms in which they are clothed. It does not matter to him whether 90 per cent. of the land in a country is mortgaged or only 5 per cent.; all that he is concerned with is the legal nature of a mortgage, the methods whereby it can be legally created, and the legal rights and powers which it gives to the parties affected.

VIII.—§ 91. LEGAL AND EQUITABLE OWNERSHIP, AND LEGAL AND EQUITABLE RIGHTS.

Salmond has distinguished two senses in which the word 'ownership' is used. (i) (§ 86, p. 339) 'Ownership, in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man owns is in all cases a right.' (ii) (§ 87, p. 342) 'A very common form of speech enables us to speak of the ownership of material things' and (p. 345) 'This is a use of the term which is quite different from that hitherto considered by us. Ownership, as a particular kind of right, must be clearly distinguished from ownership, as a particular kind of relation to rights of all descriptions. We cannot class together the right of ownership and the ownership of a right'.

So in sense (i) ownership means the having of a right—any kind of right—vested in oneself, and in sense (ii) it denotes one particular kind of right which I may have so vested, and this kind of right is further described as a kind of right which can be held over 'material things'.

But at times Salmond seems to confuse the two senses. In § 85 (p. 335) he has given a classification of *rights* into legal and equitable rights. In § 91 (pp. 345–8) he gives a classification of *ownership* into legal and equitable ownership. This apparently refers to ownership in sense (ii), that is, ownership as a kind of right over material things, because he says (p. 356), 'One person may be the legal and another the equitable owner of the same thing at the same time'. He then adds that this distinction is not identical with his distinction between legal and equitable *rights*, because 'The equitable ownership of a legal right is a different thing from the ownership of an equitable right'. He seems thus to have reverted to sense (i) of ownership.

The clue is that Salmond is here treating a right as a *thing*. A has a right, *e.g.* a claim of debt; B may have, *e.g.* as the result of an equitable assignment, an equitable right 'over' A's right. B may also have similar equitable rights 'over' a

purely equitable right vested in A. In both cases A's right is in this context conceived as a thing 'over' which rights can be held. (Whether it is legitimate so to treat rights as things is another question.) When A's right is the right of 'ownership' of corporeal property, B may similarly have equitable rights of various kinds in respect of the property. We can speak of these either as equitable rights 'over' A's right of ownership or as equitable rights 'over' the corporeal property. The latter form of speech is the more usual and serves better to bring out the fact that they 'run with' the property, that is, that they will bind not only A but also (with the exception of the *bona fide* purchaser for value of a legal estate in the property) other owners of or holders of rights in the property concerned. And when B has an equitable right whose content (the use and enjoyment to which it entitles him) is similar to the content of the right which we call 'ownership', we naturally and conveniently call B's right 'equitable ownership'.

The substantial difference between legal and equitable ownership is that equitable ownership, like all equitable rights, is of no avail against the *bona fide* purchaser for value of a legal estate in the property. Salmond is thus hardly correct in saying that the distinction between legal and equitable ownership is different from that between legal and equitable rights. It is different only as species from genus. The distinction between legal and equitable ownership is one example of the distinction between legal and equitable rights.

The distinction between legal and equitable rights arises from the co-existence of two systems of rules, which, although since 1875 they are administered in the same Court, are still kept apart in the mind of judges and lawyers. The formal conflict between them has been resolved in favour of Equity. Equitable rights attach themselves to common law rights and bind and bend them to the will of Equity. Even the case where the common law right appears to prevail (the case of the *bona fide* purchaser), and indeed may be said materially and substantially to prevail, over the equitable right previously created in favour of a third party does not disprove the formal supremacy of Equity. The third party's equitable right fails against such a purchaser because of a rule of Equity giving the purchaser priority. The maxim, 'Where the equities are equal, the law prevails', would be better written, 'Where the equities are otherwise equal, the equity with the law on its side prevails'.

But in spite of the unification of the Courts and the formal supremacy of Equity—in spite, too, of the cross-cutting pro-

visions of the 1925 legislation concerning registrable interests (cf. Mr. Parker's note 220, pp. 336-8)—we shall have to go on distinguishing between legal and equitable rights so long as we think of and speak of and teach the two systems separately.

The distinction between legal and equitable rights (like such analogous distinctions as that between civil and Praetorian rights in Roman law) has reference to the internal structure of the system of rules followed in the Courts. It may happen to coincide to some extent with the distinction discussed above between 'trust' or 'titular' or 'bare' rights and beneficial rights. But the two distinctions are based on entirely different principles. The one is a juristic distinction based on the internal structure of the legal system, the other is based on the non-juristic test of the incidence of the material or economic benefit secured by the right.

IX.—§ 87 and § 88. CORPOREAL AND INCORPOREAL OWNERSHIP AND CORPOREAL AND INCORPOREAL THINGS.

Salmond is not very happy in this discussion. But who is? Perhaps we can best start by thinking of the *content* of rights, that which I can do or require others to do in virtue of my right. Sometimes this has obvious reference to what in ordinary language we call a tangible thing. If I am owner of Blackacre or hold an easement over Blackacre or have an estate contract in respect of Blackacre, the content of my right has reference to and my right may be said to be 'over' the tangible and visible farm of Blackacre. When I make a contract to purchase a specific identified chattel I acquire a right which, as it does not affect the chattel in the hands of third parties and is not specifically enforceable even against the vendor, can hardly be called a right 'over' the chattel, but is still a right relating or having reference to a tangible visible thing. Sometimes, however, the 'thing' which I may use or which other people must respect is not 'corporeal' in the same way as the farm of Blackacre or a specific tangible chattel, yet to call it a 'thing' is not too far removed from our ordinary speech, *e.g.* artistic forms, ideas, the goodwill of a business, my health, my reputation, the affection of my wife. These may well be called 'incorporeal things'. When B owes A £10, the content of A's right is the payment of £10 by B, but the object or 'thing' is not any specific tangible coins in the possession of B; it is simply the abstraction 'a sum of £10'. This, by stretching ordinary language a little farther, we might still call a kind of 'incorporeal thing', but it is an abstraction difficult for the mind to

grasp and the superficial or weary thinker is inclined to identify it either with the tangible money in the possession of B or with the act of payment (the *content* of A's right) which A can claim from B or even with A's right itself. All of these identifications are erroneous. When the content of A's claim is the performance of services by B, it is again difficult to identify the 'thing' concerned; it may perhaps be B's strength and skill, or perhaps B's physical body. Cf. Salmond, p. 298.

All things are abstractions, concepts of the mind. An elementary training in philosophy shows us that we have no direct knowledge of 'things in themselves'. 'Things' are mental abstractions which we create and use for the purposes of our thinking. So 'things' in law are merely abstractions created for the purpose of our legal thinking. 'In contemplation of law the *esse* of things is *haberi*.' (POLLOCK, *First Book of Jurisprudence*, p. 138.)

But we may legitimately divide these abstractions into classes, and following ordinary language we may make a classification into tangible or corporeal things (shops, factories, pianos, books, coins) and intangible or incorporeal things (goodwill, manufacturing processes, sonatas, poems, sums of money). Ownership, in Salmond's sense (ii), means a kind of right (or bundle of rights—that is another question) which most systems of law recognize as capable of being vested in a person in respect of a corporeal thing. A legal system may also recognize a kind of right (or bundle of rights) capable of being vested in a person in respect of some incorporeal things which is very similar in its content to the right over corporeal things which it calls 'ownership'. My right to a patent or goodwill may, like my ownership of a chattel, not only give me very full powers of economic exploitation but also be alienable and inheritable, and here it would be no straining of language to call my right over such an incorporeal thing by the name of ownership. But language would be strained a little if we called a man's right to his reputation 'ownership' of his reputation, and still more if we spoke of him as 'owning' the sum of money which his debtor is bound to pay him. It would be better not to speak at all of the 'ownership' of incorporeal things, *e.g.* not to say that I 'own' a goodwill but simply that I have a right to the goodwill of a business. We should thus avoid the temptation to identify the thing with the content of the right or even with the right itself.

In any case, whether or not we allow ourselves to speak and think of the ownership of incorporeal things, it is an unneces-

sary and unjustifiable metonymy of Salmond's to call such ownership 'incorporeal ownership' and to call the ownership of corporeal things 'corporeal ownership'. Ownership, being a right, is neither corporeal nor incorporeal.

X.—§ 95 AND § 105. CORPOREAL AND INCORPOREAL POSSESSION.

These phrases appear to mean possession of a corporeal thing and possession of an incorporeal thing. The metonymy is the same as in the phrases 'corporeal ownership' and 'incorporeal ownership'.

The same difficulty of identifying incorporeal things attends us here and the same temptation besets us to identify the thing which is the object of a right with the conduct which is the content of a right or even with the right itself. A man may do certain acts (*e.g.* fish in a stream) or receive the benefit of the acts of others (*e.g.* take payment of money) with or without any right thereto. In such a case he may be said to be possessing something with or without title, just as the man who holds a chattel or occupies land is in possession, whether or not he has a title. He might be said to be possessing 'a fishing' or 'a certain benefit', his acts (or the acts of others towards him) being the content of his possession. Like the possessor of a corporeal thing he may have a previous right which gives him a title to possess—or he may have no title beyond the fact of his possession (where the law protects a possessor on the mere ground of his possession, we can talk of the 'right of possession', meaning the right created by the fact of possession without further title)—or he may have no legal protection and therefore no right at all. Again, the 'thing' which he possesses may be the object of someone else's right or it may be *res nullius*. But in all cases, if we are to talk of possession at all, what is possessed must be a *thing* and not either conduct (the content of a right) or (worse still) a right. And the difficulty of identifying the thing concerned in the cases of 'possession' of incorporeal things suggests that it might be better, as in the case of ownership, to apply the word 'possession' only to the possession of corporeal things.

These remarks apply to possession as contrasted with ownership in Salmond's second sense, *viz.* ownership as a kind of right over things. But Salmond in § 86 has added further confusion by opposing (a) possession, (b) encumbrance to ownership in his first sense, *viz.* the relation between a person and any right which is vested in him.

(a) On p. 339 he declares that by 'possession of a right' is meant 'the *de facto* relation of continuing exercise and enjoyment, as opposed to the *de iure* relation of ownership'. This implies that he means by ownership not the having a right but the having a right to that right. But what is the sense of having a right without having a right to it? What Salmond should have said is that a man may *de facto* be having some use and enjoyment, taking the benefit of the content of a right, without having a right thereto. He may be either having some use and enjoyment to which someone else has a right, or he may be having some use and enjoyment to which there is no corresponding right vested in any one. But in neither case should we speak of him as having or enjoying a *right* to which he has no right. If he is possessing anything at all, he must be possessing a *thing*.

(b) On p. 340 he says: 'The owner of the right is he in whom the right itself is vested, while the encumbrancer of it is he in whom is vested, not the right itself, but some adverse, dominant, and limiting right in respect of it.' So the holder of a mortgage on my property may be said to be encumbering my right of ownership. But this is not a direct relation of the mortgagee himself to my right of ownership. The mortgagee is owner (in sense (i)) of his right of mortgage, and it is his *right* that encumbers my right. Encumbrance is a species of relation of one right to another, not of relation of a person to a right. This understood, Salmond's remarks are useful. It is important to remember that in the complex web of rights created by the rules of any legal system the rights of one person are continually crossing and affecting the rights of others.

THE LANGUAGE OF CRIMINAL SCIENCE.

L. RADZINOWICZ and J. W. C. TURNER.

I.—UNTIL quite modern times the expression 'Criminal Science' was taken to mean no more than study of criminal law. The nature and the method of criminal science at this stage is best illustrated by the well-known *dictum* of Carrara, one of the chief exponents of the classical school of criminal law, that 'crime is not an entity in fact but an entity in law; it is not action but infraction' ('il delitto non è un ente di fatto ma un ente giuridico, è una infrazione e non un'azione'). The personality of the delinquent, the origin of crime, the nature and the efficacy of punishment, the relationship between society and criminal justice,—problems which now constitute such an important part of criminal research—for many decades remained completely outside the scope of criminal science as then understood.

II.—This of course does not mean that this range of problems did not interest inquiring minds until recently. Philosophers, historians, legislators, physicians, in fact critical thinkers in many fields have dealt with the origin and prevention of crime as presenting problems of a biological, psychiatric or social nature, refusing to confine themselves to the narrow dogmatic point of view above indicated.¹ Such essays have in most cases been of little scientific value, but they are a convincing proof that human thought long ago realized that the study of criminal law alone cannot provide all the information necessary for a proper understanding of the phenomena of crime.

III.—The first really scientific contribution in this field was made in the second half of the nineteenth century by the Italian criminological school known as the 'Scuola Positiva'. Whatever critical attitude may have been adopted towards their doctrine, there is no doubt that this school, by deepening and

¹ For the history of these early investigations see Antonini, 'I precursori di Lombroso', Torino, 1930; S. A. Ettinger, 'Das Verbrecherproblem in anthropologischer und soziologischer Beleuchtung', Bern, 1909; W. A. Bonger, 'An Introduction to Criminology', pp. 26 ff., London, 1936.

extending our knowledge of crime, and by drawing attention to many theoretical and practical problems, made plain the inadequacy of the narrow traditional view, and showed that criminal law is only one of the branches of the vast and complex science of crime. It was not an accident but a symptom of the new orientation of thought towards the problem of criminality, that each of the three founders of this school established in the language of criminal science a new technical term: Lombroso—that of Criminal Anthropology; Ferri—that of Criminal Sociology; and Garofalo—that of Criminology.²

Another landmark in the development of Criminal Science is formed by the first systematic compilation of criminal statistics in France in 1825.³ It was at once recognized that such a compilation was not only a valuable source of information but also that it opened up a new avenue of research into criminality in all its aspects. The first notable scientific achievement on this basis was made some ten years later by A. Quetelet,⁴ who is generally regarded as the founder of the study of criminal statistics.

Further investigations, carried on prior to the war of 1914–18⁵ and renewed with great intensity after the war, not only in Italy, but in a great many other European and non-European countries,⁶ contemporaneously with reforms of criminal legislation and of prison systems, have confirmed and consolidated the new approach inaugurated by the Italian school.

This process of expansion of criminal science has also undoubtedly been accelerated by the progress achieved in recent times in the field of sciences dealing, on the one hand with the study of man (biology, psychology, psychiatry), and with the study of society on the other (social anthropology, sociology, social psychology, statistics). The development of these sciences has not only made it possible to obtain a broader view of criminality, but has provided material for the constructive tasks of criminal science, which in most parts of the world has at last

² See Lombroso, 'L'Uomo delinquente', 1898; Ferri, 'Sociologia Criminale', 1894 (title given to the third edition of his book: *I nuovi orizzonti del diritto penale*); Garofalo, 'La Criminologia', 1884.

³ *Compte general d'administration de la justice criminelle pour l'anné 1825*, publié en 1827, Imprimerie Nationale.

⁴ A. Quetelet, 'Sur l'homme et le développement de ses facultés ou *Essai de physique sociale*', Paris, 1835.

⁵ The contribution of the French criminological school with its eminent representative G. Tarde, is particularly noteworthy. Good service has been also rendered by the German school founded by Franz von Liszt (*Junge Deutsche Kriminalschule*) while the scientific and practical activity pursued by the *L'Union Internationale de Droit Penal*, has been of great value.

⁶ Since the last war a great contribution has been made and is being made by American science.

come to be recognized as a subject of the first importance, calling for the highest qualities of research. Its adoption in the curricula of academic education is increasing in proportion as its practical utility is appreciated.

IV.—It is hardly possible in the initial stages of the development of a new branch of learning that the subject-matter of the study should be scientifically classified. Classification, however, is ultimately essential, or confusion of thought and waste of effort will result.

Examination of the modern literature of criminal science establishes that there is still great need for further work of classification. There are two symptoms which are especially disquieting: (a) a process which one might call 'atomization', that is a tendency to over-division of the subject-matter, and (b) a tendency to a confusing ambiguity in the use of technical terms.

As to (a) we find, for example, the following separate headings: criminology, criminal science, criminal anthropology, criminal biology, criminal psychology, prison anthropology, criminal psychiatry, criminal psychopathology, criminal sociology, penal philosophy, penal policy, criminal policy, criminal statistics, penology, prison science, prison law, prison pedagogy, police science, forensic psychiatry, medical jurisprudence, legal medicine, criminal law, penal legislative policy, criminal prophylaxis. This is not a complete list but it contains the terms most frequently found.

As to (b): To have so many terms is confusing enough, but the confusion is greatly increased by the fact that even these terms have different meanings for different authors. Von Liszt,⁷ for example, uses the term 'criminology' to cover criminal anthropology and criminal sociology, but for Parmelee⁸ the term means those two branches and four others in addition, namely, theory of the nature and evolution of crime, criminal psychology, criminal jurisprudence, and penology. For Ferri⁹ criminal sociology is a general term covering all branches, including criminal law, but for Vargha¹⁰ criminal sociology is merely a part of criminal anthropology. These examples will suffice, but they could easily be multiplied.

⁷ See von Liszt, 'Strafrechtliche Aufsätze und Vorträge', Berlin, 1905, vol. ii, p. 296.

⁸ See M. Parmelee, 'Criminology', New York, 1919, p. 5.

⁹ See E. Ferri, 'Criminal Sociology', Boston, 1917, p. 536 and Ferri, 'Principii di Diritto Criminale', Rome, 1928, p. 100 ff.

¹⁰ See J. Vargha, 'Die Abschaffung der Strafrechtschaft', Graz, 1898, vol. i, p. 174.

It is not surprising, therefore, that the attempts at classification so far made, being based on such uncertain foundations, have been unsuccessful.¹¹ In most cases when a writer has put forward his own system of classification, he has found himself the object of attacks from all sides, even from his own disciples.¹² In a later edition of his work von Liszt suddenly made certain modifications, but without giving any reason, whereas Ferri, although manifestly unable to refute his critics, adhered to his system to the end. Nor is clarity to be achieved by evading classification, for to do this is to attempt to work without system, and system is of the essence of scientific investigation. This is the weak point in some modern American text-books which in other respects make valuable contributions to criminal science.

V.—It is necessary, however, to emphasize the danger of attaching too much importance to the fact that a satisfactory classification of criminal science has not yet been formulated: a superficial view can easily mistake a defect of arrangement for a defect of substance. It must be remembered (a) that criminal science is developing very rapidly and can already show many important achievements in different directions such as the study of delinquents, the origin and prevention of crime, the treatment of criminals; (b) that the atomization of criminal science is largely a natural reaction against the unjustifiable restriction of its scope for so long to the study of criminal law alone; (c) that even if a precise classification is constructed, the science must always contain a great number of particular topics because of the complicated character of its problems, which have to be approached from different angles. Often a new subject of study is opened up in consequence of the realization of some new practical need. So soon, for example, as the reformation of

¹¹ See for the best known classifications Ferri, 'Criminal Sociology', Boston, 1917, p. 553 ff. and 'Principii di Diritto Criminale', Roma, 1928, p. 100 ff.; Liszt, 'Strafrechtliche Aufsätze und Vorträge', Berlin, 1905, vol. i, pp. 290—467, vol. ii, pp. 230—250, *idem* pp. 284—318; Gross, 'Handbuch für Untersuchungsrichter als System der Kriminalistik', München, 1904, 2nd ed. vol. i, pp. ii—xii; Vargha, 'Die Abschaffung der Strafknechtsschaft', Graz, 1898, vol. i, pp. 173—194; F. Grispigni, 'Introduzione alla Sociologia Criminale', Torino, 1928, pp. 3—90 and 'Corso di Diritto Penale', Padua, 1933, vol. i, p. 29 ff.; R. Garraud, 'Precis de Droit Criminel', 14th ed. Paris, 1926, pp. 8—16; G. Vidal et J. Magnol, 'Cours de Droit Criminel et de Science Penitentiaire', Paris, 1928, 7^{em} ed. p. 70 ff.; H. Donnedieu de Vabres, 'Traité Elementaire de Droit Criminel et de Legislation Penale Comparee', Paris, pp. 11—13; W. A. Bonger, 'An Introduction to Criminology', London, 1936, pp. 7—9; Selig, 'Kriminologie' in 'Handwörterbuch der Kriminologie', Berlin, 1936, vol. II, pp. 67—77.

¹² See Ferri, 'Criminal Sociology', Boston, 1917, p. 556; Grispigni, 'Introduzione alla Sociologia Criminale', Torino, 1928, p. 84 ff.

prisoners was regarded as important, educational treatment became necessary on a systematic basis and it is the study of this subject to which such terms as penitentiary pedagogy, *Kriminal Pedagogik*, *Pedagogia Emendativa* have been applied.

None the less it must be recognized that over-elaboration and the use of identical terms in different meanings is necessarily a hindrance to the development of any science and that these defects are prominent in criminal science. As Prof. Bally says¹³: 'The first condition which logic imposes on language is that it must be clear and that it must avoid ambiguity; to that end it is necessary that as far as possible each sign should have only one value, and that each value should have only one sign to represent it; that a word, for example, should have only one meaning, and that each idea should have only one word to express it. . . .' Bally calls this principle '*le principe d'univocité*'.

Even if we cannot go so far as Condillac in saying '*une science est une langue bien faite*', we cannot deny the part which language plays in the development of a science.¹⁴ It is the object of the present article to show that the difficulties created by over-elaboration and by ambiguity of language can be avoided, and that the scope of criminal science can be defined by a simple yet comprehensive classification.

VI.—It is obvious that the first task of criminal science is the explanation of the origins (aetiology) of crime. We cannot to-day share the confidence of the early writers who regarded it as easy to discover the causes of crime by uncritical reliance on a few simple methods of investigation which they mistakenly considered to be accurate and exhaustive, carried out over a narrow field.¹⁵ To-day we realize that the problem is difficult and complicated and calls for research of a most elaborate character into the widest possible range of material if the results are to have true scientific value. So far, however, as classification is concerned we must aim at simplicity.

A crime is an offence committed by an individual in society; this self-evident statement must be our point of departure. We

¹³ See Charles Bally, '*Le Langage et la Vie*', Paris, 1928, p. 63.

¹⁴ J. Becquart writes in his work '*Les mots à sens multiples dans le droit civil Français*', Paris, pp. 16—17: 'A juger équitablement il faut convenir que, si la langue n'est pas toute la science, si peut-être elle n'est pas une partie de celle-ci elle en conditionne la formation, la conservation et l'expansion.'

¹⁵ It has, for instance, long been believed that criminal statistics can provide us with a complete explanation of the origin of crime. See among others the opinion of W. Rawson, '*An Inquiry into the Statistics of Crime in England and Wales*', *Journal of Statistical Society*, vol. ii, 1839, p. 318.

must look, therefore, for the causes of crime in the personality of the delinquent and in the conditions of society in which he is placed and acts. But it must be understood first, that the words 'personality' and 'society' are here used in the broadest possible sense. We mean the entirety of the personality of the delinquent and the entirety of his social environment. Secondly, it must always be born in mind that these two elements are closely interrelated; the personality is moulded by the environment and the environment can only exercise its effects through the human personality.

VII.—To take first the case of the delinquent himself. The advances made in the last half-century by the allied sciences which deal with the study of man enable us to see a mistake made by the early investigators into the personality of the criminal ('l'uomo delinquente'). They examined only certain particular aspects of the personality and they tried to show that the individual causation of crime lay in one of these aspects. To-day it is known that the whole personality must be examined in all its manifestations and reactions. We must consider, for example, the contributions of heredity and we must ascertain the effects of any bodily abnormality or weakness, of any glandular peculiarity, and of any instability of mind, temperament or character. We must see what the individual's reactions are to external stimuli and impacts. That is to say, we must have recourse to the science of heredity, anatomy, physiology, psychology, pathology and science of character (etology), in order to analyse what we may call the constitution of the individual personality.¹⁶

We conclude then that it is the delinquent who is the object of the first branch of investigation into the origin of crime and that this investigation is two-fold: (a) we must obtain the most complete and precise knowledge of the whole personality of the delinquent and (b) we must ascertain to what extent and in what way his criminality can be explained by this personality. To this branch of criminal science we give the name *Criminal Biology*.¹⁷

¹⁶ We use this term 'constitution' in the sense used by Brugsch, 'Einführung in die Konstitutionslehre' in Brugsch-Levy: 'Die Biologie der Person', Berlin, 1926, vol. i, p. 21 ff. As regards text-books on criminal biology see di Tullio, 'La Costituzione Delinquenziale nella Etiologia e Terapia del delitto', Roma, 1929; Lenz, 'Grundriss der Kriminalbiologie', Wien, 1927; von Rohden, 'Einführung in die kriminalbiologische Methodenlehre', Berlin, 1933; W. Healy, 'The Individual Delinquent', London, 1915.

¹⁷ It will thus be seen that criminal biology in this meaning includes such subjects as criminal psychology, criminal psychiatry, criminal psychopathology,

VIII.—Turning next to the second element in the study of the causation of crime, the social environment of the delinquent, it must be emphasized that this element, too, as in the case of the element of personality, is a complex of different, but mutually interrelated, influences.

We must, for example, seek to discover to what extent we must recognize as factors in crime such influences as climate, racial association, composition, density and distribution of population, nature of employment, economic conditions, class and group stratification, domestic and educational surroundings, general cultural influences, and political organization.¹⁸ All these are the elements which together make up the general structure of the society in which the individual is placed, and in which his crimes are committed. It is this close connexion between social influences and crime which Lacassagne had in mind when he made his famous statement: '*La société a les criminels qu'elle merite.*'

The object then, of the second branch of investigation into the origin of crime is social environment, and this investigation also is two-fold: (a) we must obtain the most complete and precise knowledge of every sort about crimes and criminals,¹⁹ and (b) we must ascertain to what extent and in what way social influences have operated to produce these crimes and criminals.

The study of social conditions, however, helps to explain not merely the origin and evolution of crime, but also other matters with which criminal science deals, such, for example, as the basis and machinery of criminal justice, and the origins, functions and evolution of criminal law and punishment, all of which are

because these subjects deal merely with particular aspects of the human personality, from the general study of which they cannot be separated. It also includes what is sometimes called criminal anthropology, in the sense of the study of human physical structure. This term criminal anthropology has indeed been employed by some writers in a much wider sense, but in our view it is not so suitable a title for the whole study of the individual as is Criminal Biology. The term 'prison anthropology' is too narrow because the prisoner is necessarily a delinquent (unless he is a victim of a miscarriage of justice), and is of course included in the scope of criminal biology.

¹⁸ Studies on the social causation of crime are nowadays very numerous and very advanced. It is enough to mention that in dealing only with the topic of economic conditions such distinguished and concise writers as Kahn and Bonger each required several hundreds of pages merely to survey the work done in this field, while, as Prof. Thorsten Sellin has recently shown, there is still a wide range of inquiry to be pursued. See J. Van Kan, '*Les causes économiques de la criminalité*', Paris, 1903; W. A. Bonger, '*Criminality and Economic conditions*', Boston, 1916 (especially first part of the book); Thorsten Sellin, '*Research Memorandum on Crime in the Depression*', Social Science Research Council Bulletin, No. 27, 1937.

¹⁹ This of course includes such matters as the meaning to be given to the word 'crime' viewed as a social phenomenon, the evolution of crime from the earliest times, statistical data about crimes and criminals, and the relation of crime to other social phenomena such as prostitution and vagrancy.

the products of varying social needs and social attitudes. To any such study of social conditions which can be of use in the whole field of criminal science we give the name *Criminal Sociology*.

The majority of authors have restricted the term criminal sociology to investigations into the origin of crime, and have given various names to social inquiries concerning other topics. For example, von Liszt and Bonger give the name of 'Penology' to investigations into the social origin of punishment,²⁰ and Grispigni the name of 'Sociologia giuridico-penale' to the study of the social origins of criminal law.²¹ But in our opinion the topics of crime, criminal law and punishment are interrelated and investigations into their origins involve the study of the same social conditions. Such study should have only one name, *i.e.* criminal sociology. A multiplicity of terms when not necessary suggests division where no division exists, and leads to confusion. It must, however, be noted that this side of criminal sociology, which investigates the influence of social conditions on crime, is much more developed than that which deals with the influence of social conditions on the other objects studied by criminal science. We still have nothing like adequate knowledge of such fundamental topics as the interaction between the other institutions of society and criminal institutions such as the machinery of justice, criminal law, and systems of punishment.

For investigations pursued through criminal biology and criminal sociology we adopt the name *Criminology*.²²

IX.—Very often the term 'criminal statistics' is associated with criminology and criminal sociology. Indeed, such an outstanding authority as von Mayr²³ identified criminal statistics with criminal sociology. Certainly it can be said that it was the appearance of criminal statistics which first focused attention on the influence of social factors in the genesis of crime, and that they are important in all departments of criminal science, and this may account for mistaken views as to their function and place in that science.

²⁰ Liszt, 'Strafrechtliche Aufsätze und Vorträge', Berlin, 1905, vol. ii, p. 296; Bonger, 'An Introduction to Criminology', London, 1936, p. 8.

²¹ Grispigni, 'Introduzione alla Sociologia Criminale', Torino, 1928, p. 65.

²² The formation of the word 'Criminology' is similar to that of 'Sociology' on which Prof. Ernest Barker writes in his foreword to 'Further Papers on the Social Sciences' (edited by J. E. Dugdale, London, 1937, p. 9): '... the term Sociology. This is a word (barbarous and hybrid to the pure scholar, because it combines a Latin beginning with a Greek ending) ...'

²³ Von Mayr, 'Forschungsgebiete und Forschungsziel der Kriminalstatistik', zeitschrift f.d. ges. Strafrechts, vol. 32, 1911, pp. 33—64.

To assist in placing criminal statistics in their correct relation to the rest of criminal science the following observations are offered. (a) Criminal statistics are a collected mass of information about crime and criminals, presented in numerical form, and this in itself cannot be ranked as a science. (b) Investigators into the social background of crime must use not merely criminal statistics but many other sources of information. (c) Criminal statistics are used not only for the purposes of criminal sociology, but also, as we shall see, in other departments of criminal science. They are therefore ancillary to branches of criminal science and cannot be classed as a separate branch.

Nevertheless, there are two reasons why the importance of criminal statistics cannot be too strongly emphasized. First, they provide indispensable information as to the number and kinds of crimes committed, as to the number and kinds of criminals, differentiated by sex, age, previous offences, etc., as to the number and kinds of punishment inflicted, the like information as to those criminals who are imprisoned, and as to the operation of all the organs of criminal justice (*e.g.*, the activities of the police and of the courts). Secondly, criminal statistics afford a test of the efficacy of the different measures taken against crime. As Lord Brougham said in 1860: 'Full and minute statistical details are to the lawgiver, as the chart, the compass, and the lead to the navigator.'²⁴ The same idea was in the minds of the promoters of the first Statistical Survey in 1825 in France to which we have alluded.²⁵

The extension of criminal science and the refinement of the machinery of justice creates a demand for more and more statistical information. The term criminal statistics must be understood as a generic term covering numerical compilations of several kinds of information.²⁶

Finally, although criminal statistics are correctly regarded as an instrument, yet it must be noted that on the one hand their compilation, and on the other hand their interpretation, can be entrusted only to one who has a high degree of scientific

²⁴ 'Report of the Proceedings of the Fourth Session of the International Statistical Congress', London, 1861, p. 217.

²⁵ In the introduction to the first volume of the report it is stated: 'ce travail . . . contribuera dans la suite au perfectionnement de la législation elle-meme, dont il fera ressortir, avec la meme évidence, les avantages et les inconvenients. Le Gouvernement . . . sera averti, par cette suite d'observations, des changements qui pourraient devenir nécessaires . . .'

²⁶ Some authors distinguish as many as six different groups of criminal statistics: *e.g.* von Scheel, 'Einführung in die Kriminalstatistik, etc.', *Allg. Stat. Arch.* 1890, i, p. 186 ff.; Roesner, 'Kriminalstatistik', *Hand. der Kriminologie*, 1936, ii, p. 26 ff.

training and knowledge. The untrained mind will not know what data should be collected, and when collected, will either make nothing of them, or will draw fallacious conclusions which may lead to great harm.

X.—Although the first task of criminal science is to ascertain the origins of crime this is not its main purpose. The main purpose of criminal science is to ascertain how best to fight against crime. That this is its essential function is shown by the fact that the fight was for long carried on without any knowledge of the origins of crime. To-day, however, this knowledge is indispensable for it reveals the number and nature of the objectives to be attacked, many of which were never suspected before the origins of crime were studied. The aim, then, is to prevent crime. This can be effected in two ways, first by dealing with the causes of crime, for example by their removal or neutralization, and second by dealing with the prospective delinquent, for example by education or deterrence. We call this branch of criminal science criminal policy.

This term is not new, and it is no exaggeration to say that the subject is now recognized on all sides as an essential part of criminal science.²⁷ As in the case of many other sciences it is difficult to establish to whom must be ascribed the merit of having introduced criminal policy into the scope of criminal science. Some authors attribute it to Feuerbach,²⁸ others again go still farther back; thus von Liszt quotes a passage from a book by Hencke published in 1823, which shows that Hencke had a remarkably clear and wide conception for his times of criminal policy.²⁹

In spite, however, of the fact that criminal policy as a branch of criminal investigation has so long been recognized, there is still a great difference of opinion as to its scope.³⁰ What we object to in the current definitions is their narrow

²⁷ Prof. H. Donnedieu de Vabres, when referring to this term writes: 'Cette expression a fait fortune' ('La politique criminelle des états autoritaires', Paris, 1938, p. 3).

²⁸ Donnedieu de Vabres, *op. cit.* p. 3.

²⁹ 'He who wishes thoroughly to understand criminal policy in theory, and still more if he is called upon as legislator to apply it, must above all seek to understand human nature and the laws of its development in different periods and places. Knowledge of anthropology in the widest sense, and of the history of natural evolution, is indispensable to the study of criminal policy. Not less important is investigation into the origins of crime, which are often to be found not in the degeneracy or moral perversity of the delinquent, but in the defects of the laws or of the institutions of civil society.'

³⁰ A review of different definitions of criminal policy can be found in: Von Hippel, 'Deutsches Strafrecht', Berlin, 1925, p. 534 ff., and Peters, 'Die Kriminalpolitische Stellung des Strafrichters', 1932, pp. 1—18.

conception of criminal policy, as a result of which many important problems that should be included in its range are arbitrarily relegated to other branches of criminal science. In our view the principal object of criminal policy should be described as follows:

(a) Criminal policy must be based on the conclusions reached by criminology as to the causes of crime. It must then elaborate a preventive system, by elimination or neutralization of those causes. For this purpose use must be made of the institutions and achievements of social services and activities, all of which are manifestations of what is called the social policy of the community. Criminological research has proved that social measures introduced for other purposes and often without any appreciation of their repercussions on criminality, have in fact resulted in decrease of crime. Such measures are regarded for the purposes of criminal policy as indirect measures of prevention and should be taken as the basis of what is to be called a system of general criminal prophylaxy.

But in addition to this there are often measures of prevention expressly directed against crime. Such are, police activities of a preventive character, the activities of private associations such as the Society for the Prevention of Cruelty to Children, and the organizations for the after-care of prisoners. These latter measures are regarded for the purposes of criminal policy as direct measures of prevention and should be taken as the basis of what is to be called a system of special criminal prophylaxy.

(b) The systems of criminal prophylaxy outlined above are designed to operate before crime has been committed.³¹ Criminal policy, however, must also study the measures which are necessitated by crimes already committed. This is a wide subject for research and has to be subdivided into several different sections. First, it is necessary to decide what kind of criminal legislation must be enacted both as to substantive law and as to procedure; that is to say, criminal policy involves the study of criminal legislation as an instrument of prevention of crime.³² It has to decide, for example, what kinds of con-

³¹ Such activities as the after-care of prisoners aim at the prevention of future crimes and are not part of the punishment for their previous crimes.

³² Of course criminal legislation itself may have other purposes and effects which have nothing to do with prevention of crime. For example criminal legislation is deliberately employed to consolidate political or social regimes and such measures must therefore be taken into account by students of criminal policy. But criminal legislation may have unexpected effects and therefore the legislator must consider this possibility, and weigh the advantages of any proposed measures in the sphere of crime, against possible disadvantages in the social and political spheres. The reduction of crime which it effects may be more than offset by the harm it causes in other directions.

duct should be regarded as criminal, what degree of punishment should be inflicted in such cases, in what directions and subject to what limitations the powers of the police force should be employed in investigations into cases of crime, how far prosecutions should be left to the discretion of private individuals, or be initiated by officers of the State, what should be the machinery and varieties of the Courts of justice, the importance to be attached to the opinions of experts, the discretionary powers to be vested in judge and jury, the latitude to be given to the prosecution and to the defence at the trial of the accused. In fact all the institutions of criminal administration and law must be the subject of review under criminal policy.

(c) Criminal law operates by the infliction of sanctions on those found guilty of committing crimes: this is what is often called the repressive function of criminal law. English law has established a notably wide system of sanctions and has already gone far in the direction of recognizing the necessity of adapting the punishment to each particular category of criminals rather than to each particular category of crime. Thus different sanctions are applied to children, to first offenders, to the mentally normal, from those applied to adults, to recidivists, and to the mentally defective. Again the sanctions range from dismissal to capital punishment. It is the function of criminal policy to adopt the classification of criminals formulated by criminology and to decide on the appropriate treatment for them. In other words, in this field the function of criminal policy consists in the general study of the nature and efficacy of different methods of punishment and in the assignment of the particular punishment most appropriate to each category of offenders. This is the study of criminal sanctions in the widest sense.

(d) The efficacy of sanctions depends to a great extent upon the mode of their execution, and upon the machinery for their execution.

To take as an instance capital punishment; criminal policy has first to decide if this sanction should be employed at all. If it is to be employed then further questions arise, for example whether or not it should be carried out in public, and by what means. But obviously machinery and method are of the highest importance in such sanctions as probation orders, when everything depends on the type and extent of the supervision, as the name probation 'system' indicates. The most striking example, however, is afforded by those sanctions which involve deprivation of liberty. A whole range of different establishments must

be set up to provide the treatment needed for the different categories of offenders. Such are, Approved Schools, Borstal Institutions, special institutions for adult first offenders, for recidivists (known as preventive detention institutions), for mental defectives. It is nowadays recognized that the whole of this machinery, which is commonly known as the 'Prison System',³³ must be regarded not merely negatively as a method of effective deprivation of liberty, but positively, as a method of preventing crime.³⁴ Thus criminal policy is concerned with every aspect of the execution and operation of sanctions.

(e) Finally, criminal policy must combine the activities described above and adjust them so as to organize a single comprehensive machine. The ideal at which it aims is the co-ordination of all the institutions, private as well as public, in the community so that each can be called upon to make its contribution. Essential information can be obtained from some, from others active participation also. The need for foresight and for wise measures of preparation to meet the problems of the future on a wide national basis is increasingly recognized in all departments of public life. Consistently with this, the attitude of the State towards crime has already undergone great changes and it now regards its function as not confined to the formal legal repression of the criminal but as extending to positive preventive action of a wide social character. With the acceleration of this movement the need of co-ordination of effort will become greater, and the possibility of achieving it more within reach.

In conclusion then, *Criminal Policy* is the second branch of criminal science. It may be described as that branch of criminal science which has as its immediate aim the study and the systematization of all measures to be taken against crime in the sphere of prevention, of legislation, and of punitive treatment, and as its ultimate aim the co-ordination of the whole into an organized system of State activity.³⁵

XI.—It is, as indicated above, a function of criminal policy to decide what conduct shall be classed as criminal and the punish-

³³ This name, when first established, was doubtless appropriate as there were then no other detentive institutions than prisons. To-day, however, it is clear that the expression is much too narrow.

³⁴ Whereas originally the tendency was to measure the success of the system by the percentage of escapes, the modern test is to consider the conduct of the prisoners after their release.

³⁵ It will thus be seen that criminal policy in this meaning includes such subjects as have been called penal legislative policy, criminal prophylaxis, penal policy, prison science, penology (the part of penology which studies punishment as a social phenomenon is included in criminal sociology and that part which deals with the efficacy of punishments falls within criminal policy).

ment appropriate to it. Crimes and punishments are thus fixed. *Criminal Law* is the instrument of criminal policy; for it is in criminal law that are found the rules prescribed by criminal policy for deciding first whether what has been done amounts to a crime, secondly, whether the particular person accused has committed that crime, and thirdly what is the assigned sanction if he has committed it.

We have seen that criminal law was at one time regarded as all-important, indeed as synonymous with criminal science itself. It is now, however, properly regarded as merely a branch of criminal science. Yet it is an important branch which must be accorded its own place in the main classification. In the present stage of the development of criminal science, criminal law still remains in most countries the focus of public attention, but it must be emphasized that when viewed in its scientific perspective, criminal law is not the most important part of criminal science.³⁶ It is to be regarded as dependent and functional rather than as creative.

From what we have said above it will be seen that the scheme of classification at which we have arrived is tripartite. *Criminal Science* has three branches, *Criminology*, *Criminal Policy*, and *Criminal Law*. In our opinion the whole field is thus covered. Criminology nourishes criminal policy, criminal policy shapes criminal law, and all three combine to form Criminal Science.³⁷

³⁶ It follows that the education of a student of criminal law should be grounded on a knowledge of the other branches of criminal science. Unfortunately this has not yet been fully or widely recognized but substantial progress in this matter has been made in some schools of law.

³⁷ It remains to mention that through the advance of criminal science improvements are effected in the administration of criminal justice requiring the aid of new departments of study. There has thus appeared for example what is known as *Criminalistique*, or *Police Science*. This aims at assisting the police and other agents of the state in the detection of crime, the arrest of criminals and the acquisition of evidence. This subject has now been highly developed and continues to gain in precision. Institutes and special laboratories have been established and there is much literature, e.g. H. Gross, 'Handbuch für Untersuchungsrichter als System der Kriminalistik', 1914, 6th ed.; Niceforo and Lindenau, 'Die Kriminalpolizei und ihre Hilfswissenschaften', 1909, and 'Kriminaltaktik und Kriminaltechnik', 1933; Reiss, 'Manual de Police Scientifique', 1911; Heindl, 'System und Praxis der Daktyloskopie und der sonstigen technischen Methoden der Kriminalpolizei', 1927; Lucard, 'Traité de Criminalistique', 1931. Again Medical Jurisprudence, Forensic Psychiatry, Gerichtliche Medizin, Forensische Psychiatrie are terms applied to medical knowledge when employed to assist the course of justice. In other words this study is concerned with the evidence of expert medical witnesses. Thirdly what can be called Forensic psychology (*Psicologia Giudiziaria*) is the study of the psychology of all those taking part in forensic proceedings in the criminal Courts. Its purpose is to obtain knowledge through which evidence can be elicited and valued, appropriate punishments selected and the exercise of judicial discretion understood.

It is true that all such studies can provide material of great value to criminal science, but they are ancillary to that science and not part of it.

FORMEDON EN REMAINDER AT COMMON LAW.

W. H. HUMPHREYS.

IT is a far cry to go back now to a controversy which took place almost fifty years ago between two of the foremost exponents respectively of the historical and practical schools of English law, Maitland and Challis. The technical subject of Remainders after Conditional Fees before the passing of *De Donis* was in question. According to Maitland's view,¹ Remainders limited after Conditional Fees, were common enough, and he vouched Bracton, and a considerable number of Fines all prior to 1285, in support of his argument, at the same time admitting that no Writ protecting such Remainders had been found in any *Registrum Brevium*.

Challis is downright. He lays down the rule that there cannot be a remainder after a conditional fee although he says there is a somewhat obscure passage in Bracton to the contrary. 'It is an indisputable fact', says Challis, 'that by the common law there did exist a *formedon en reverter* for the benefit of the donor, as is expressly stated in the Statute *De Donis*,² while there did not exist a *formedon en remainder* in respect of conditional fees. This seems to shew that there could be no such remainder upon a conditional fee.'³

Challis's argument, therefore, appears to depend upon the non-existence of a writ of Formedon en Remainder.⁴ Let such a writ prior to 'De Donis' be produced and his position is completely undermined. It is because such a writ, a Formedon en Remainder before 1285, has recently been noted in a MS. *Registrum Brevium*, that the present short article has been written. But before giving the Writ and the interesting 'Nota' that accompanies it, it may be well to quote a little further from the writings of the two protagonists. In the article by

¹ See art. in 6 L. Q. R. (1890) 22—26, on 'Remainders after Conditional Fees', reprinted in *Collected Papers*, ii, 174—181.

² Westm. II (*Dé Donis*), c. 1. 'Breve per quod donator habet recuperare suum deficiente exitu satis est in usu in Cancellaria.'

³ Challis, *Real Property*, 1st ed. (1885) 64—65.

⁴ Cf. Westm. I, c. 39 (1275) '... et auters briefs semblables par les queux terres ou tenements sont demaunds que devoient descend reverter remainder ou eschier per mort danc' ou dauter...' would seem to indicate that writs to protect remainders were well known many years before 'De Donis'.

Maitland already referred to, he criticizes Challis's 'indisputable fact' in the following words: 'But really there are two facts here; the former, the existence of the *formedon en reverter* is indubitable, while the latter, the non-existence of the *formedon en remainder* seems to me extremely doubtful. Certainly that writ was not expressly given by the statute, and no word in the statute implies that it is wanted. There are so many yet extant copies of the *Registrum Brevium* as it stood before the *De Donis*, that I should not like to speak confidently of their contents. But even suppose we grant that there was as yet no "writ of course" suited to this case, this would prove but little, for in Henry III's reign the Chancery held itself very free to issue "brevia formata", writs adapted to special cases.'⁵

In the next edition of his *Real Property*, Challis deals with Maitland's criticism in a special Appendix⁶ from which the material portion is quoted. 'Next, as to the question about the existence of a *formedon en remainder* at the common law. I am disposed to conclude that there was no such thing, because I find Fitzherbert, Lord (*sic*) Coke, and Booth all apparently consenting in that opinion, and holding that the writ had its origin in the equitable construction of the Statute *De Donis*. Mr. Maitland hesitates to accept this conclusion, remarking that there exist many copies of the *Registrum Brevium* as it stood before the statute, and that he does not like to speak confidently as to their contents. I would not for a moment presume even to hazard a guess; and I respectfully await whatever information Mr. Maitland may hereafter extract from those venerable documents. But in the meantime I would humbly observe, that he seems to be suggesting a very extraordinary state of affairs. It appears that, in his view, remainders upon conditional fees were common; and therefore that the rights which they conferred would need a means to enforce them; and yet that, somehow or another, nobody has ever heard for certain of the existence of this indispensable writ; while the persons who were the most likely to have heard of it, if there was such a thing, deny its existence. Can any other example be pointed out, of the existence of an important class of rights, founded upon the existence of a class of estates in real property, without any writ to enforce them? or, at the least, with a writ of which the existence is so obscure, that nobody can testify to it, while Mr. Maitland can only urge, that negative evidence is not absolutely conclusive. All this is in remarkable contrast with

⁵ Collected Papers, ii, 179.

⁶ Real Property, 2nd ed. (1892), App. II, 392.

the circumstances surrounding the writ of *formedon en reverter*. There we find an equal certainty about the existence of the right, and also about the existence of the writ to enforce it. It can hardly be maintained that rights under a remainder were less likely to mature into possession than rights under a reverter. Mr. Maitland, I think, will admit that in this respect remainders and reverter stand in exactly the same position. Whence, then, comes this remarkable difference, in point of prominence, between the two writs? Is it not a plausible inference, that the one writ did exist and the other did not?⁷

In Pollock and Maitland's *History of English Law*,⁷ Maitland, after discussing this matter of remainders, says: 'On the whole we must leave it a doubtful question whether before that statute [De Donis] the remainderman had any writ adapted to his case. . . . Whether that action was first given a few years after or a few years before the statute is a small question; the action was not given by the statute, but was the outcome of pure common law doctrine and the practice of conveyancers.'

Nothing further occurred to resolve the problem and Professor Holdsworth in his comprehensive *History of English Law*⁸ sums the matter up thus: 'The writ of "*formedon in remainder*" is not given by the statute [De Donis, 1285]; nor is there any positive evidence that it existed at common law. Estates in remainder were certainly limited to take effect after conditional fees; but as yet we have no evidence that any writ was devised for their protection. However that may be, it is quite clear that such a writ was introduced shortly after the passing of the Statute de Donis.' In a footnote to this page Professor Holdsworth states: 'It is true that Bracton, f. 69, says that there was such a writ, and that he will give it, but he fails to do so.'

And there the matter stood.

For some time past the writer has been working on MS. Registers of Writs of the thirteenth century and early fourteenth century and has recently discovered a Writ of *formedon en remainder* which vindicates in a very striking manner the position taken up by Maitland.

In one of the extracts quoted from his article Maitland says that even if there were no writ of course suited to the case, that would prove but little, as the Chancery held itself very free to issue '*brevia formata*', writs adapted to special cases.

⁷ 2nd ed. (1898), ii, 25.

⁸ 3rd ed. (1923), iii, 18, note 4

The writ now brought forward is one of a small group of seven writs 'De forma donationis', two of the catchwords being 'De forma donationis quod dicitur revertere', and 'De eodem quod dicitur descendere debet', and is contained in a well written MS. of a *Registrum Brevium*, or '*Registrum de Cancellaria*', consisting of forty-eight folios small quarto size. This Register is part of a volume which also contains various thirteenth century law tracts and statutes, and is the property of the Inner Temple, through the courtesy of whose authorities the volume was examined.⁹

Following the last-mentioned writ 'De eodem quod dicitur descendere debet', and without any catchword of its own, the writ in question reads:—

'Rex vicecomiti salutem. Precipe H. quod juste etc. reddat B. et E. uxori ejus tantum terre cum pertinentiis in C. quod H. dedit A. et prefate E. sorori ejus et heredibus de corpore suo exeuntibus. Et quod post mortem ipsius A. prefate E. remanere debet per formam donationis quam predictus H. inde fecit eidem A. eo quod idem A. obiit sine herede de corpore suo exeunte ut dicunt. Et nisi etc.

'Et notandum quod istud breve consignatum fuit apud Cestr' in exercitu Reg[e] existente apud Rothel' ad expugnandum Lewelinum et David inimicos domini Regis.'

Here is a gift of land that may be simply expressed as made by H. to A. and the heirs of his body issuing, with remainder to E. the sister of A. On the failure of the heirs of the body of A., H. has resumed possession of the subject of the original gift, whereupon E., the remainderman, in the language of a later period, brings her action—E. being married, her husband is joined in the proceedings—to recover the land, since to her it ought to remain by the form of the gift, A. having died without any heir of his body.

That is to say we have here a writ to protect a remainder after a conditional fee, or to use Mr. Challis's words, to enforce a right founded upon the existence of a class of estates in real property. Now let us turn to the '*Nota*' which in the MS. immediately succeeds the writ.

This writ, it says, was sealed at Chester, the King being with the army at Rothel' (Rhuddlan) fighting Llewelyn and David the enemies of the lord King. That gives us a date a few years before the passing of '*De Donis*' in 1285, for Llewelyn fell in a petty skirmish at Builth on December 10, 1282, and some

⁹ MS. 511.9, f. 124.

few months later David was surrendered, tried and executed, Michaelmas 1283. In the campaign against Llewelyn and David in 1282 Edward had his military headquarters at Rhuddlan, where the Bishops and Knights had been summoned to assemble on August 2 of that year. We can therefore date the writ with some certainty as between August 2 and Llewelyn's death on December 10, 1282.

Possibly the main body of the royal secretariat, the Chancery, was stationed at Chester, the chief base for the campaign in North Wales, on the frontier some thirty miles south-east of Rhuddlan, where indeed the King may have been when the writ was actually sealed.

Here then is an example of a Remainder after a conditional fee, with a writ for the protection or enforcement of the right, a writ issued by the Chancery 'which held itself very free to issue "brevia formata", writs adapted to special cases', surely a remarkable vindication of Maitland's prescience, after the lapse of some fifty years.

PRIORITY AFTER 1925 OF MORTGAGES OF A LEGAL ESTATE IN LAND.

R. E. MEGARRY.

FOR reasons both of space and of simplicity, the scope of this article is restricted within narrow limits. The subject to be considered is the priority of mortgages made after 1925 which affect a legal estate in land. This by itself excludes any consideration of transitional provisions or of mortgages of an equitable interest; in addition, the questions of the Middlesex and Yorkshire Deeds Registries, tacking, and conflicts between more than two mortgages will be ignored. Except where otherwise indicated, 'mortgage' is used as including both a mortgage and a charge.¹

Before dealing with the present law, it is necessary to consider briefly the rules for determining priority which applied before 1926.

1.—BEFORE 1926.

There were two basic principles for determining the priority of mortgages of a legal estate in land:—

- (i) 'Qui prior est tempore, potior est jure'; mortgages primarily ranked in the order of their creation²; but
- (ii) 'Where the equities are equal, the law prevails'; if, apart from the order of their creation, a legal and an equitable mortgage had equal claims to priority, the legal mortgage was preferred.³

A conflict between two mortgages might fall under any one of four heads: (1) Where both mortgages were legal; (2) where the first was legal and the second equitable; (3) where the first was equitable and the second legal; and (4) where both were equitable. These will be considered in turn.

(1) Where both Mortgages were Legal.

Such conflicts do not appear to have come before the Courts frequently.⁴ Leaseholds were usually mortgaged by sub-demise,

¹ For the distinction between a mortgage and a charge, see *post*, p. 250.

² Fisher & Lightwood, *Mortgages*, 7th ed. 451.

³ *Bailey v. Barnes* [1894] 1 Ch. 25 at 36.

⁴ Some of the text-books consequently do not deal with them: see *e.g.* Hanbury & Waldock, *Mortgages*, 308, 309; Cheshire, *Modern Real Property*, 4th ed. 611; Falconbridge, *Mortgages*, 2nd ed. 86.

thus permitting successive legal mortgages, but leaseholds which had been mortgaged more than once were comparatively rare. In the case of freeholds, mortgages by the grant of a long term of years had been common in the time of Glanvil and Bracton, but had become rare by Littleton's time.⁵ The modern mortgage by conveyance of the fee simple permitted only one legal mortgage to be created. However, some cases did reach the Courts where a fee simple had been mortgaged by the grant of two successive legal terms of years,⁶ or a lease had been mortgaged by the grant of two successive legal sub-terms.⁷ In such cases, priority normally depended on the order of creation, for after the grant of one lease, a second lease must take effect in reversion upon the first, and a legal estate in reversion was postponed to one in possession.⁸ Further, even if the second mortgagee was a *bona fide* purchaser for value of a legal estate without notice, this gave him no right to take free from a prior *legal* incumbrance.

Although a mortgage thus *prima facie* had priority over another created subsequently, this priority was lost if the former mortgagee had delivered the title deeds to the mortgagor and so enabled him to represent the property to the second mortgagee as being unencumbered.⁹

(2) Where a Legal Mortgage was Followed by an Equitable Mortgage.

In such a case, the legal mortgagee had two claims to priority: first, that his was the prior mortgage in point of time, and, secondly, that his legal estate was superior to the second mortgagee's equitable interest.

However, this natural priority might be lost in a number of ways:—

(a) *By fraud*.—If the first mortgagee fraudulently combined

⁵ This seems to have been due to the recognition of the impossibility of the mortgagee enlarging the term of years into a fee simple: Holdsworth, H. E. L. iii, 130. See Davidson's Precedents, 4th ed., vol. ii, pt. ii, p. 460, for a discussion of the advantages and disadvantages of such mortgages.

⁶ *Aldridge v. Duke* (1679) Rep. t. Finch 439.

⁷ *Jones v. Rhind* (1869) 17 W. R. 1091.

⁸ *Coote, Mortgages*, 9th ed. 1240. See *Mason v. Rhodes* (1885) 53 L. T. 322 (equitable mortgage to A, followed by two legal mortgages to B and C respectively: C had no notice of B's mortgage, and part of his loan was made for the purpose of paying off A's mortgage: held, C had priority over B to the extent of A's mortgage only). See also *Hurst v. Hurst* (1852) 16 Beav. 372 at 374; *Re Russell Road Purchase-Moneys* (1871) L. R. 12 Eq. 78.

⁹ *Jones v. Rhind* (1869) 17 W. R. 1091. Fraud, or gross negligence in failing to obtain the title deeds (see *infra*), would doubtless also have postponed the first mortgagee.

with the mortgagor to induce the second mortgagee to make his loan, the first mortgagee was postponed to the second.¹⁰

(b) *By estoppel*.—If the legal mortgagee either expressly or by implication made some misrepresentation by which the equitable mortgagee was deceived, the legal mortgagee might be estopped from asserting his priority.¹¹ This might occur, for example, through the legal mortgagee indorsing a false receipt for his money on the mortgage,¹² or through his delivering the deeds to the mortgagor to enable him to raise a further loan. In the latter case, upon principles of estoppel or agency,¹³ the legal mortgagee would be prevented from asserting his priority over any equitable mortgagee thereby induced to believe that the property was unincumbered, even if the mortgagor had agreed to inform the equitable mortgagee of the legal mortgage,¹⁴ or to raise only a limited sum.¹⁵ Once the legal mortgagee had clothed the mortgagor with apparent authority to deal with the property freely, he could not afterwards claim the protection of any undisclosed limits set to the authority.¹⁶

(c) *By gross negligence in relation to the deeds*.—The cases fall into two categories: (i) Failure to obtain the deeds; (ii) loss of the deeds after they had been obtained.¹⁷

(i) *Failure to obtain the deeds*.—A legal mortgagee who was guilty of gross negligence in failing to obtain the deeds was postponed to a subsequent equitable mortgagee who had exercised due diligence.¹⁸ Thus the legal mortgagee was postponed if he failed to ask for the deeds at all.¹⁹ But he did not lose priority if he asked for them and accepted a reasonable excuse for their non-production,²⁰ or if his only default was failure to inform a prior equitable mortgagee of his mortgage so as to prevent the deeds being handed back to the mortgagor on

¹⁰ *Peter v. Russel* (1716) 1 Eq. Ca. Abr. 321 at 322.

¹¹ See *Dixon v. Muckleston* (1872) 8 Ch. App. 155 at 160.

¹² See *Rice v. Rice* (1853) 2 Drew. 73.

¹³ *Rimmer v. Webster* [1902] 2 Ch. 163.

¹⁴ *Briggs v. Jones* (1870) L. R. 10 Eq. 92: cf. *Martinez v. Cooper* (1826) 2 Russ. 198.

¹⁵ *Perry Herrick v. Attwood* (1857) 2 De G. & J. 21.

¹⁶ *Brocklesby v. The Temperance Permanent Building Society* [1895] A. C. 173; *Rimmer v. Webster* [1902] 2 Ch. 163 at 173, applied in *Tsang Chuen v. Li Po Kwai* [1932] A. C. 715; and see *Abigail v. Lapin* [1934] A. C. 491.

¹⁷ *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 26 Ch. D. 482 at 487.

¹⁸ *Hunt v. Elmes* (1860) 2 De G. F. & J. 578 at 586, 587. See *Walker v. Linom* [1907] 2 Ch. 104 at 114.

¹⁹ *Clarke v. Palmer* (1882) 21 Ch. D. 124; *Walker v. Linom* [1907] 2 Ch. 104; and see *Colyer v. Finch* (1856) 5 H. L. C. 905 at 926, 927.

²⁰ *Manners v. Mew* (1885) 29 Ch. D. 725 (loan to a solicitor by one of his clients).

redemption.²¹ Further, a legal mortgagee who obtained only some of the deeds might nevertheless retain his priority: if he obtained only the mortgage deed itself, but reasonably believed that this was all that he was entitled to, he was not postponed.²²

(ii) *Failure to retain the deeds.*—Even gross negligence in the custody of the deeds was held not to postpone the legal mortgagee.²³ But this rule may have changed since it was laid down in 1884.²⁴

(3) Where an Equitable Mortgage was Followed by a Legal Mortgage.

The primary rule that mortgages rank in the order of creation was here sometimes displaced by the superiority of the legal estate. But for this to be done, the legal mortgagee had to be able to show that he was a *bona fide* purchaser²⁵ for value of a legal estate without notice of the equitable mortgage.²⁶ The onus of proof lay on the legal mortgagee,²⁷ for the vested interest of the equitable mortgagee was not lightly to be displaced.²⁸ If the legal mortgagee was affected with notice of the equitable mortgage when he made his own mortgage, *e.g.*, through failing to inquire for the title deeds,²⁹ or accepting an unreasonable excuse for their non-production,³⁰ he would be postponed, but otherwise he would not.³¹ Various excuses for non-production of the deeds came before the Courts. In one case, it was held unreasonable to accept the excuse that the deeds would not be delivered up because they related to other property,³² while in others it was held reasonable to accept the excuse that the deeds were in Ireland (where the property

²¹ *Grierson v. National Provincial Bank of England, Ltd.* [1913] 2 Ch. 18.

²² *Cotter v. The National Provincial Bank of England, Ltd.* (1904) 20 T. L. R. 607 (loan to a solicitor by one of his clients).

²³ *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 26 Ch. D. 482 (deeds kept in a safe, of which, to the knowledge of the mortgagees, the mortgagor had a key).

²⁴ See a discussion of this difficult subject in Hanbury & Waddock, *Mortgages*, 323–325; Maitland, *Equity*, 2nd ed. 137, 138.

²⁵ 'Purchaser' includes a mortgagee: *Brace v. Duchess of Marlborough* (1728) 2 P. Wms. 491.

²⁶ It was only when the equities were equal that the law prevailed, and 'he that has Notice has no Equity at all': *Oxwith v. Plummer* (1708) Gilb. Ch. 13 at 15.

²⁷ See *Att.-Gen. v. Biphosphated Guano Co.* (1879) 11 Ch. D. 327 at 337.

²⁸ *Cory v. Eyre* (1863) 1 De G. J. & S. 149 at 167.

²⁹ *Worthington v. Morgan* (1849) 16 Sim. 547; *Berwick & Co. v. Price* [1905] 1 Ch. 632.

³⁰ *Oliver v. Hinton* [1899] 2 Ch. 264. The judgments of Sir F. H. Jeune P., Rigby L.J. and Romer J. seem to be based on notice (see *Walker v. Linom* [1907] 2 Ch. 104 at 114), but Lindley M.R. founds himself on gross negligence. See Ashburner, *Equity*, 2nd ed. 62.

³¹ *E.g. Hudston v. Viney* [1921] 1 Ch. 98.

³² *Oliver v. Hinton* [1899] 2 Ch. 264.

lay),³³ or that the mortgagor was rather busy but would produce the lease in question when next he came to market.³⁴ Nor was a legal mortgagee deprived of priority where he obtained only some of the deeds, reasonably believing them to be all.³⁵ But no definite rule can be laid down that any particular excuse was or was not a reasonable one to accept; all the circumstances had to be considered.³⁶

(4) Where both Mortgages were Equitable.

The primary rule that priority depended on the order in which the mortgages had been created applied in this case, provided that in other respects the mortgagees had equal equities.³⁷ Thus, if apart from the order in which the mortgages were created one mortgagee had a better equity than another, the primary rule was displaced. For example, an equitable mortgagee who had taken his mortgage without notice of an earlier equitable mortgage could claim to take free from it if he had a better right to the legal estate than the earlier mortgagee,³⁸ *e.g.* if the owner of the legal estate had declared himself a trustee of it in favour of the subsequent equitable mortgagee³⁹; the benefits of being a purchaser of a legal estate without notice extended to cases such as this.⁴⁰ Further, inequitable conduct by the earlier mortgagee might postpone him to the subsequent mortgagee. Probably the same degree of gross negligence was required to displace him as was necessary to displace a legal mortgagee.⁴¹ Thus he was held not to have lost his priority where he accepted some only of the title deeds on the mortgagor's written assurance that there were no others.⁴² But failure to ask for the deeds at all⁴³ or delivery of the deeds to the mortgagor without pressing for their early

³³ *The Agra Bank, Ltd. v. Barry* (1874) L. R. 7 H. L. 135.

³⁴ *Hewitt v. Loosemore* (1851) 9 Hare 449.

³⁵ *Ratcliffe v. Barnard* (1871) 6 Ch. App. 652.

³⁶ Thus in *Hewitt v. Loosemore* (*supra*) the mortgagor was a solicitor and the mortgagee a farmer 'unacquainted with legal forms'.

³⁷ *Rice v. Rice* (1853) 2 Drew. 73 at 78.

³⁸ *Wilkes v. Bodington* (1707) 2 Vern. 599; see *White & Tudor, Leading Cases in Equity*, 9th ed. 126–128.

³⁹ *Stanhope v. Earl Verney* (1761) 2 Eden 81; *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231 at 263. See, however, *Heath v. Crealock* (1874) 10 Ch. App. 22.

⁴⁰ Cf. *Willoughby v. Willoughby* (1756) 1 T. R. 763.

⁴¹ See *Taylor v. Russell* [1891] 1 Ch. 8 at 14–20, where the authorities are reviewed; Coote, *Mortgages*, 9th ed. 1350. See, however, S. C. [1892] A. C. 244 at 262; *National Provincial Bank of England v. Jackson* (1886) 33 Ch. D. 1, and Maitland, *Equity*, 2nd ed. 125–129, for the view that a lesser degree of negligence sufficed to displace an equitable mortgagee.

⁴² *Dixon v. Muckleston* (1872) 8 Ch. App. 155.

⁴³ *Layard v. Maud* (1867) L. R. 4 Eq. 397; *Farrand v. Yorkshire Banking Co.* (1888) 40 Ch. D. 182.

return⁴⁴ were both held sufficient to postpone the earlier equitable mortgagee.

2.—AFTER 1925.

There is nothing in the legislation of 1925 which expressly alters the two basic principles set out at the beginning of this article.⁴⁵ Indirectly, however, their importance has been greatly diminished by the Land Charges Act, 1925, which has made many, but not all, mortgages registrable as land charges. Most registrable mortgages are either puisne mortgages or general equitable charges. A puisne mortgage is any legal mortgage affecting land not being a mortgage protected by a deposit of documents relating to the legal estate affected, and (where the whole of the land affected is within the jurisdiction of a local deeds registry) not being registered in the local deeds register.⁴⁶ A general equitable charge is any equitable charge⁴⁷ affecting land (other than a limited owner's charge⁴⁸) which is not secured by a deposit of documents relating to the legal estate affected and does not arise or affect an interest arising under a trust for sale or a settlement, and is not included in any other class of land charge.⁴⁹

It will be seen from this that a distinction must be drawn between those mortgages which are protected by a deposit of documents relating to the legal estate affected and those which are not. Apart from the order of creation, the main interest

⁴⁴ *Waldron v. Sloper* (1852) 1 Drew. 193; *Dowle v. Saunders*, (1864) 2 H. & M. 242.

⁴⁵ In *Beddoes v. Shaw* [1937] Ch. 81, 'Qui prior est tempore, potior est jure' was accepted as still forming the basis of the rules governing priority of equitable mortgages: see S. C. [1936] 2 All E. R. 1108 at 1110, 1111.

⁴⁶ Land Charges Act, 1925, s. 10 (1).

⁴⁷ 'Charge' is not defined, but is generally taken to include a mortgage here: see, however, p. 253, n. 35, *post*.

⁴⁸ A limited owner's charge is an equitable charge affecting land, acquired by a tenant for life or statutory owner under the Finance Act, 1894, or any other statute, by reason of the discharge by him of any death duties or other liabilities, and to which special priority is given by the statute: Land Charges Act, 1925, s. 10 (1).

⁴⁹ Land Charges Act, 1925, s. 10 (1). This is not a very satisfactory definition. The exception of charges arising, or affecting an interest arising, under a trust for sale or settlement applies to most mortgages of equitable interests, but does not exclude mortgages of interests such as an equitable fee simple held under a bare trust or an agreement for a lease, the latter of which seems to have been held to be an interest in 'land' as defined by the Conveyancing Act, 1881, s. 2 (ii): *Re Lake & Taylor's Mortgage* (1885) 33 W. R. 597. However, the words 'not secured by a deposit of documents relating to the legal estate affected' clearly imply that *some* legal estate must be affected for a charge to fall within the definition, and thus apparently confines the definition to equitable charges of legal estates. If this was not so, the priority of mortgages of interests such as an equitable fee simple under a bare trust, or an agreement for a lease, would be governed both by the Land Charges Act, 1925, s. 13 (2), and the Law of Property Act, 1925, s. 137 (but not s. 97).

before 1926 was focussed on whether the mortgage was legal or equitable; the presence or absence of the deeds was usually material only in determining whether a mortgagee had been guilty of such gross negligence as would alter the priority *prima facie* established by the other rules. But after 1925 this is no longer the case. The presence or absence of the deeds must be considered before it can be decided whether priority is to be determined according to the rules relating to registration or not. Thus priorities must now be considered under four main heads: (1) Where both mortgages are protected by a deposit of documents relating to the legal estate affected; (2) where neither mortgage is thus protected; (3) where the first is thus protected and the second not; and (4) where the second is thus protected and the first is not. Under each of these heads may arise any of the four combinations already considered depending on whether the mortgages are legal or equitable. In short, apart from any loss of priority through fraud, estoppel or gross negligence, there are now sixteen cases to consider instead of four.

(1) Where both Mortgages are Protected by a Deposit of Documents Relating to the Legal Estate affected.

A mortgage by deposit of title deeds can be created without all the deeds being deposited,⁵⁰ provided those which are deposited form material evidences of title.¹ Even one deed out of several may suffice² if deposited with intent to create a mortgage.³ Further, even if the first mortgagee originally obtained all the deeds, he may subsequently have lost possession of some or all of them, and these may have been used to create a second mortgage.⁴ It is true that if the first mortgagee parts with all of the deeds, it is difficult to see how his mortgage is 'protected'⁵ or 'secured'⁶ by a deposit of documents. The question is whether 'protected' or 'secured' means *originally* protected or secured, or *continuously* protected or secured. At first sight the latter seems the more probable, but the objection to this is that as often as the deeds were parted with and regained, so often the mortgage would fluctuate between being registrable

⁵⁰ *Roberts v. Croft* (1857) 24 Beav. 223; *Ratcliffe v. Barnard* (1871) 6 Ch. App. 652; *Dixon v. Muckleston* (1872) 8 Ch. App. 155.

¹ *Lacon v. Allen* (1856) 3 Drew. 579.

² *Ex p. Chippendale* (1835) 1 Deac. 67.

³ *Ex p. Pearse* (1820) Buck 525.

⁴ See e.g. *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 26 Ch. D. 482.

⁵ Law of Property Act, 1925, s. 97; Land Charges Act, 1925, s. 10 (1).

⁶ Land Charges Act, 1925, s. 10 (1).

as a puisne mortgage or general equitable charge, and not being thus registrable.⁷ The former alternative is therefore perhaps preferable.

It is commonly said that a mortgage protected by a deposit of documents relating to the legal estate affected is not registrable as a land charge.⁸ Clearly such a mortgage is not registrable as a puisne mortgage or a general equitable charge. This apparently applies even to a mortgage protected by only some of the deeds, for a mortgage is excluded from these categories if it is protected by 'a deposit of documents',⁹ a phrase which does not seem to require a deposit of *all* the documents. But some mortgages appear to be registrable as estate contracts. An estate contract is defined as 'any contract . . . to convey or create a legal estate'.¹⁰ Obviously a legal mortgage does not fall under this head, but some equitable mortgages do. A distinction must here be drawn between an equitable mortgage proper and an equitable charge. The former conveys some estate or interest to the mortgagee subject to a right of redemption, whereas the latter, without doing this, gives the chargee certain rights over the property concerned.¹¹ Under the same principles as were applied in *Parker v. Taswell*¹² and *Walsh v. Lonsdale*,¹³ Equity treats a contract to create a legal mortgage, or an imperfect attempt to create one, as an actual mortgage,¹⁴ provided it is supported by sufficient evidence in writing¹⁵ or a sufficient act of part performance. Since 1783,¹⁶ the rule has been that a mere deposit of title deeds which cannot be accounted for in any other way¹⁷ is taken to be part performance of a contract to create a legal mortgage,¹⁸ even if not a

⁷ This would lead to difficulties concerning the proper date for registration; e.g. if the deeds were stolen at an unknown date (as in *Whipp's Case* (*supra*)). It would also complicate priorities even further. S. 13 of the Law of Property Act, 1925, would prevent s. 97 of the same Act from affecting priorities, but it would not exclude the operation of s. 13 (2) of the Land Charges Act, 1925.

⁸ *E.g.* Hanbury & Waddock, *Mortgages*, 339; Cheshire, *Real Property*, 4th ed. 624; 76 L. J. News. 107.

⁹ Land Charges Act, 1925, s. 10 (1).

¹⁰ *Ibid.*

¹¹ See *Jones v. Woodward* (1917) 116 L. T. 378, at 379; *London County & Westminster Bank, Ltd. v. Tompkins* [1918] 1 K. B. 515.

¹² (1858) 2 De G. & J. 559.

¹³ (1882) 21 Ch. D. 9.

¹⁴ See *Parker v. Housefield* (1834) 2 My. & K. 419 at 420; *Re Hurley's Estate* [1894] 1 I. R. 488.

¹⁵ *Ex p. Hall* (1879) 10 Ch. D. 615.

¹⁶ *Russel v. Russel* (1783) 1 Bro. C. C. 269.

¹⁷ *E.g.* a delivery of the deeds by mistake (*Wardle v. Oakley* (1864) 36 Beav. 27) or to enable a mortgage to be drawn up, there being no intent to create a present security (*Norris v. Wilkinson* (1806) 12 Ves. 192; cf. *Hockley v. Bantock* (1826) 1 Russ. 141) will not create a mortgage.

¹⁸ *Edge v. Worthington* (1786) 1 Cox 211; *Pryce v. Bury* (1853) 2 Drew. 41; *affd.* 1854—see L. R. 16 Eq. 153 n.; *Carter v. Wake* (1877) 4 Ch. D. 605 at 606

word about such a contract has been said.¹⁹ Such a deposit thus suffices to create a true equitable mortgage,²⁰ although in practice it is usually accompanied by a deed containing (*inter alia*) an express agreement to create a legal mortgage on demand.²¹ Thus at least two classes of equitable mortgages appear to fall within the definition of an estate contract: *i.e.* (i) those constituted or accompanied by an express contract to create a legal mortgage,²² and (ii) those constituted by a contract to create a legal mortgage implied from the circumstances.

There seems to be little doubt that an equitable mortgage of the first class is registrable as an estate contract.²³ Further, once it is accepted that it is the agreement to create a legal mortgage that is the basis of an equitable mortgage,²⁴ it is difficult to escape from the conclusion that mortgages of the second class are also registrable as estate contracts. The penalty for failing to register an estate contract created after 1925 is that it is 'void' as against a purchaser of a legal estate for money or money's worth.²⁵

The question of priority can now be considered in each of the four possible cases. If both mortgages are legal, or both equitable, or the first legal and the second equitable, nothing appears to have altered the rules which applied before 1926. The first mortgagee *prima facie* has priority, but may be displaced by fraud, estoppel or gross negligence.²⁶ This applies also to an equitable charge followed by a legal mortgage, with the qualification that if the legal mortgagee can establish himself as a purchaser without notice, he will take precedence over the equitable charge. But if a true equitable mortgage is followed by a legal mortgage, then unless the former was registered as an estate contract before the latter was made, section 13 (2) of the Land Charges Act, 1925, makes the equitable mortgage

But as Hanbury & Waldock point out (Mortgages, 56, 57) it is hard to see how the mere receipt of deeds by a creditor is an act of part performance on his part on which he can rely to enforce the mortgage.

¹⁹ *Bozon v. Williams* (1829) 3 Y. & J. 150.

²⁰ See *Ex p. Nettleship* (1841) 5 Jur. 733 and cases quoted in note 18 *supra*.

²¹ See *e.g. London County and Westminster Bank, Ltd. v. Tompkins* [1918] 1 K. B. 515. It is a question of construction whether the mortgage was created by the deposit of the deeds or the execution of the deed: *Paul v. Nath Saha* [1939] 2 All E. R. 737. This question might be of importance here if the deed contained no contract to create a legal mortgage, but merely created a charge on the property.

²² 'Mortgage' here includes 'charge': Land Charges Act, 1925, s. 20 (4); Law of Property Act, 1925, s. 205 (1) (x).

²³ *Williams, Contract of Sale of Land*, 247; 69 L. J. News. 227: see, however, *Fisher & Lightwood, Mortgages*, 7th ed. 481, note (b).

²⁴ See Hanbury & Waldock, *Mortgages*, 56.

²⁵ Land Charges Act, 1925, s. 13 (2).

²⁶ S. 13 of the Law of Property Act, 1925, expressly preserves this last head. See *post*, p. 259.

'void' against the legal mortgagee, who can claim to be a purchaser (which includes a mortgagee unless the context otherwise requires²⁷) of a legal estate for money or money's worth.

It is hard to say how the Courts will construe the word 'void' here. The intention of the draftsman of the Land Charges Act, 1925, seems to have been that mortgages protected by a deposit of documents relating to the legal estate affected should not be registrable as land charges, although this is nowhere stated. Probably the Courts will seek to minimize the effect of the rather wide wording of the definition of an estate contract. Perhaps the most obvious way of escape would be to hold that the mortgage was void against the legal mortgagee so far as it operated as a contract to create a legal mortgage, but that nevertheless it was effective against him as an equitable charge.²⁸ Thus in the case of bills of sale there have been decisions restricting the word 'void' to meaning void in one aspect only. For example, a bill of sale may be void as to the chattels comprised in it, but valid as to land,²⁹ and an attornment clause in a mortgage, although 'void' under the Bills of Sale Acts, 1878 and 1882,³⁰ may still be effective to create the relationship of landlord and tenant.³¹ The argument against doing this where there is no separate agreement to create a legal mortgage is that the implied contract to create a legal mortgage is the whole basis of the equitable mortgage, and to hold the unregistered contract void against the subsequent mortgage is to destroy the existence of the equitable mortgage as far as he is concerned. Nevertheless, it seems probable that the Court would wish to hold that even if it could not order the execution of a legal mortgage, a valid equitable charge still existed.³²

In practice, few mortgages protected by a deposit of deeds are registered. However, even if the Courts adopt an attitude minimising the effect of failure to register, there is still the danger that the legal mortgagee may be able to plead that he was a purchaser of a legal estate without notice and thus is

²⁷ Land Charges Act, 1925, s. 20 (8); but see *post*, p. 255.

²⁸ See 69 L. J. News. 227.

²⁹ *Re Burdett* (1888) 20 Q. B. D. 310; *Re Isaacson* [1895] 1 Q. B. 333; *Re North Wales Produce and Supply Society, Ltd.* [1922] 1 Ch. 340; but the wording of the Bills of Sale Act (1878) Amendment Act, 1882, s. 9, more readily lends itself to this construction than that of the Land Charges Act, 1925, s. 13 (2).

³⁰ *Re Willis* (1888) 21 Q. B. D. 384.

³¹ *Mumford v. Collier* (1890) 25 Q. B. D. 279; *Kemp v. Lester* [1896] 2 Q. B. 162.

³² Another line of escape appears if the equitable mortgage has been transferred for value before the legal mortgage was made. In such a case the effect of construing 'void' as meaning 'voidable' (see *post*, p. 255) would be to protect the equitable mortgage against the legal mortgage.

not bound by the equitable mortgage. Whether he can do this will depend largely upon the circumstances under which he received the deeds, *i.e.* whether the Court considers that he had notice of their incompleteness.³³ But if the equitable mortgage is duly registered as an estate contract, registration operates as notice³⁴ and so protects the equitable mortgagee from this danger. The risks attached to failure to register may be small, but they cannot safely be ignored.

(2) Where neither Mortgage is Protected by a Deposit of Documents Relating to the Legal Estate affected.

A mortgage of a legal estate made after 1925 and not protected by a deposit of documents relating to that legal estate is normally registrable as a puisne mortgage or a general equitable charge.³⁵ The Land Charges Act, 1925, s. 13 (2) (hereafter called 'section 13 (2)') provides that such an interest created or arising after 1925 shall be 'void as against a purchaser of the land charged therewith, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase'. In the Act, unless the context otherwise requires, 'purchaser' means 'any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or in a charge on land'.³⁶ It

³³ The Court refused to do this in *Ratcliffe v. Barnard* (1871) 6 Ch. App. 652, where the legal mortgagee made no examination of the bundle of deeds handed over.

³⁴ Law of Property Act, 1925, s. 198 (1).

³⁵ In theory, it is hard to see why a true equitable mortgage should not be registered as an estate contract rather than as a general equitable charge. The definition of a general equitable charge excludes an equitable charge which is 'included in any other class of land charge' (these words did not appear in the Law of Property Act, 1922, 7th Sched. 1 (1), which the Land Charges Act, 1925, s. 10 (1) replaces). However, on the basis that an equitable mortgage creates a charge which is distinct from the contract to create a legal mortgage, it may be said that it is properly registrable as a general equitable charge. In any case, the universal practice is to register such mortgages as general equitable charges, and comfort may be derived from the maxim 'communis error facit jus' (see *e.g.* Y. B. 27 Hen. 8, Pasch. pl. 22 at fo. 10 (1535)) and the rule that the settled practice of conveyancers is part of the common law: *Re Ford and Hill* (1879) 10 Ch. D. 365 at 370. Further, s. 21 of the Land Charges Act, 1925, provides that if a charge is registrable in two or more parts of the Act, it suffices if it is registered in one. The provisions for registration of estate contracts and general equitable charges both occur in Part V of the Act, so that no help is derived from the strict letter of s. 21; but the spirit of the section clearly requires that no penalty shall attach to registration of a land charge under only one of two alternative heads in the same part of the Act. Nevertheless, it is important to know whether such a mortgage is really a general equitable charge or not, for a sale under the Settled Land Act, 1925, or under an *ad hoc* trust for sale overreaches a general equitable charge but not an estate contract (Settled Land Act, 1925, s. 72 (3); Law of Property Act, 1925, s. 2 (2), (3)), and it is rather difficult to envisage an equitable mortgage being overreached so far as it imposes a charge on the estate, and not being overreached so far as it amounts to a contract to create a legal mortgage.

³⁶ Land Charges Act, 1925, s. 20 (8).

is immaterial whether the purchaser has actual knowledge of the interest or not, for where an interest is void against a purchaser for want of registration, he is not prejudicially affected by notice of the interest.³⁷

In addition to this provision, the Law of Property Act, 1925, s. 97 (hereafter called 'section 97'), provides that 'Every mortgage affecting a legal estate in land made after the commencement of this Act, whether legal or equitable (not being a mortgage protected by the deposit of documents relating to the legal estate affected) shall rank according to its date of registration as a land charge pursuant to the Land Charges Act, 1925'.³⁸

The effect of these provisions must now be considered. No difficulty arises if the first mortgage is duly registered before the second is made. Section 13 (2) does not apply, and section 97 expressly provides for the priority of the first mortgage. Even if the first mortgage is equitable and the second legal, the legal mortgagee cannot claim to be a purchaser without notice, for the registration of the equitable mortgage is 'deemed to constitute actual notice'.³⁹

Nor is there any difficulty if neither mortgage is registered. Section 97 cannot apply, and section 13 (2) clearly makes the first mortgage void as against the second. The second mortgage consequently has priority, even if it is merely equitable and the first mortgage is legal.⁴⁰

Difficulties arise, however, where both mortgages are made before either is registered, and then one or both are registered. For example, suppose that A mortgages his land first to X and then to Y, and subsequently one or both mortgages are registered. There are four possible combinations in which this may occur: (a) Both mortgages are registered in the order Y, X; (b) both mortgages are registered in the order X, Y; (c) X alone registers; and (d) Y alone registers.

(a) *The mortgages are registered in the order Y, X.*—This is the one simple case. Y has priority both according to section 97 (his mortgage was registered before X's mortgage) and section 13 (2) (X's mortgage is void against Y for non-registration).

³⁷ Law of Property Act, 1925, s. 199 (1) (i).

³⁸ The section goes on to except mortgages or charges of registered land or land within the jurisdiction of a local deeds registry.

³⁹ Law of Property Act, 1925, s. 198 (1).

⁴⁰ Indeed, if there are several successive registrable mortgages and none have been registered, the maxim 'Qui prior est tempore, potior est jure' has no application: the mortgages rank for priority in the reverse order of creation.

(b) *The mortgages are registered in the order X, Y.*—In such a case, according to section 97, the order is X, Y: according to section 13 (2), the order is Y, X. It is hard to say which prevails. In favour of section 97 it can be said that it is expressly dealing with the priority of mortgages, whereas section 13 (2) is not: it is only by virtue of the interpretation section ⁴¹ that an unregistered land charge is made void against a mortgagee. Although ‘purchaser’ includes a mortgagee only unless the context otherwise requires,⁴² there seems to be nothing in the context of section 13 (2) to require the exclusion of a mortgagee from the definition, but possibly this might be done if the two Acts were treated as one piece of legislation and section 97 read beside section 13 (2).

In favour of section 13 (2) it can be said that:—

(i) The Land Charges Act, 1925 (15 Geo. 5, c. 22), is technically a later statute than the Law of Property Act, 1925 (15 Geo. 5, c. 20), and thus as far as the provisions of section 97 conflict with those of section 13 (2), the latter prevail.

(ii) Section 13 (2) provides that an unregistered land charge is void against a subsequent purchaser, *i.e.* X’s mortgage is void as against Y. It is therefore difficult to see how the registration of X’s mortgage can give priority to something which, *ex hypothesi*, has no existence as regards Y.

The problem still awaits solution. Perhaps much will turn on how the matter first comes before the Court, *i.e.* whether the general principles of justice in the particular case would best be served by following section 97 or section 13 (2). With slightly altered facts, other difficulties arise. Thus, suppose X transfers his mortgage to P before Y registers. It can be argued that Y’s mortgage is void against P for want of registration. Yet this is so only if P can be regarded as a purchaser of an interest in land. In the objective sense, he clearly is; but the interest which he has acquired is something which is ‘void’ as far as Y is concerned, so that Y can urge that, in a conflict between himself and P, P could not claim to have acquired any interest in land. Against this it could be argued that in the phrase ‘void as against a purchaser’, ‘void’ really means ‘voidable’. In the phrase ‘void against the trustee’ in what is now section 42 (1) of the Bankruptcy Act, 1914, ‘void’ has been held to mean ‘voidable’,⁴³ and if this line of interpretation

⁴¹ Land Charges Act, 1925, s. 20.

⁴² Land Charges Act, 1925, s. 20.

⁴³ *Re Hart* [1912] 3 K. B. 6. This decision was based partly on the wording of earlier statutes dealing with the matter (see *Re Brall* [1893] 2 Q. B. 381) and

was followed in this case, P could claim that as he had acquired the mortgage for value before Y had taken any steps to treat it as void, it was therefore valid even against Y.⁴⁴

Very tentatively, it is suggested that section 13 (2) will prevail,⁴⁵ but the subject is not one for dogmatism. Whichever section is preferred, the order it establishes can hardly be affected by estoppel in relation to the deeds or gross negligence, but probably fraud which prejudicially delayed or prevented the registration of the competing mortgage would be held a ground for postponing the mortgagee responsible.

(c) *X alone registers*.—There is no difficulty about section 13 (2); X's mortgage is void for non-registration as against Y, although, as has been seen, the exact meaning of this is not clear. But the chief problem here is the effect of section 97. This clearly seems to make X's mortgage rank according to its date of registration, but it is doubtful how it affects Y's mortgage. There are three alternatives: (i) that Y's mortgage, not being registered, cannot rank for priority at all; X's mortgage thus takes first place: (ii) that if Y's mortgage is ever registered, this registration is bound to occur after the registration of X's mortgage and so X has priority: (iii) that section 97 has no application to unregistered mortgages which thus take priority under the old law, *i.e. prima facie* according to the date of creation. The objection to the first two alternatives is that they would not work if there were two or more unregistered mortgages. Further, the wording of the section does not encourage such conclusions. The third alternative has the advantage that it gives effect to the presumption against a statute having changed the law.⁴⁶ Further, in this case it accords with the result produced by section 13 (2). For, by section 13 (2), X's mortgage is void as against Y, and, by section 97, Y's mortgage ranks according to its date of creation, and X's according to its date of registration, *i.e.* after Y's mortgage. Thus both sections give Y priority. But this puts Y in a quandary: unless he registers, his mortgage will be void against a subsequent purchaser, yet if he registers, his claim to priority will depend

partly on the ground that it would be 'almost shocking' to deprive a purchaser of property acquired in good faith: see also *Re Carter & Kenderdine's Contract* [1897] 1 Ch. 776 at 781. This type of construction is of respectable antiquity: see *e.g. Lincoln College's Case* (1595) 3 Co. Rep. 58 b.

⁴⁴ The Law of Property Act, 1925, s. 199 (1), seems to exclude a construction of the nature of *Le Neve v. Le Neve* (1747) Amb. 436 and *Greaves v. Tofield* (1880) 14 Ch. D. 563.

⁴⁵ See J. M. L., 61 L. J. News. 398.

⁴⁶ *Arthur v. Bokenham* (1708) 11 Mod. 148 at 150.

on the doubtful outcome of the problem discussed under (b) above. Despite this difficulty, the third alternative seems the best.

(d) *Y alone registers*.—In this case, there are problems similar to those discussed under the previous head. According to section 13 (2), Y clearly has priority, but if section 97 has the effect just considered, section 97 postpones Y to X, for X's mortgage takes priority from the date of its creation, and Y's from the date of registration, *i.e.* after X's mortgage. There is thus another conflict between the two sections, with the same uncertain solution as before.⁴⁷ This time it is X who is in the dilemma: if he fails to register, his mortgage will be void against a subsequent purchaser, yet if he registers he abandons his arguable claim to priority in favour of the certain loss of priority considered under (a) above.

(3) Where the First Mortgage is Protected by a Deposit of Documents Relating to the Legal Estate affected and the Second is not.

In this case, the first mortgage is not registrable unless it is a true equitable mortgage, when, as mentioned above,⁴⁸ it is registrable as an estate contract. This need for registration cannot affect priority unless the second mortgage is legal, when the question arises whether the first mortgage, if not registered, is void against the second. However, as already considered,⁴⁹ the effect of failure to register will probably be confined to holding the first mortgage void against the second only in respect of the contract to create a legal mortgage.

Apart from this, the rules applicable before 1926 seem to be still effective. Whether the mortgages are both legal or both equitable, or one legal and the other equitable, *prima facie* the first has priority. Where the first mortgage is equitable and the second legal, however, the second mortgagee can claim

⁴⁷ *Ante*, p. 255. One way of resolving the conflicts between s. 97 and s. 13 (2) would be to hold that as soon as a mortgage was registered, and s. 97 thus invoked, the operation of s. 13 (2) was thereby excluded. But there is nothing in either section to support this. If s. 13 (2) makes a charge void for non-registration, subsequent registration could give it retrospective validity only if there was some statutory provision to this effect, and there is not (*cf.* the wording of the Land Charges Registration and Searches Act, 1888, s. 12, and *Hargrave v. Hargrave* (1857) 23 Beav. 484 at 485). Further, s. 97 does not produce very satisfactory results by itself when only one mortgage is registered: see the text above.

⁴⁸ *Ante*, p. 251.

⁴⁹ *Ante*, p. 252.

priority if he can establish himself as a *bona fide* purchaser for value of a legal estate without notice of the equitable mortgage. As before 1926, the legal mortgagee will have to show that he was given a reasonable explanation of the mortgagor's inability to produce the deeds. Gross negligence and estoppel in relation to the deeds will again be inapplicable,⁵⁰ but fraud would probably postpone the mortgagee who otherwise would have priority.

The only difficulty arises in connection with section 97. Where the first mortgage is equitable and the second legal, and the second mortgagee has priority as being a purchaser without notice, it is possible that section 97 will deprive him of that priority if he registers his mortgage.¹ The argument seems to be that the first mortgage ranks for priority according to the date of its creation, and the second, by section 97, 'according to its date of registration', *i.e.* after the first mortgage. But the assumption that the first mortgagee takes priority from the date on which his mortgage was created seems hardly justified. *Prima facie*, it is true, the mortgages take priority from the dates on which they were created, but here this rule has been displaced by the second mortgagee being a purchaser without notice; the second mortgagee has priority over the first since he takes free from the first mortgage. It is thus immaterial that section 97 provides that the second mortgage shall take priority according to its date of registration; whatever date fixes the priority of the second mortgage, the first is still postponed to it. The 1925 legislation has assigned an absolute date for settling the priority of one of the mortgages, but it has not affected their relations *inter se*.² But although this seems to be a complete answer to the difficulty, it is impossible to be dogmatic about it. Registration may possibly be held to involve a loss of priority by the second mortgagee, who would thus have to choose between registration with loss of priority, and failure to register, with the danger that his mortgage will be void against a subsequent purchaser for value. Nevertheless, the Courts would probably strain against a construction which would produce such inconvenient results.

⁵⁰ The second mortgage is not protected by a deposit of deeds.

¹ See Rivington, *Law of Property in Land*, 2nd ed. 311.

² Another objection to the argument that registration involves a loss of priority is that the sidenote to s. 97 ('Priorities as between puisne mortgages') indicates that the section applies only where there are two or more mortgages not protected by the deeds. But although the exact extent of the authority of sidenotes is unsettled, it is clearly small (see Craies, *Statute Law*, 4th ed. 179, 180; Maxwell, *Interpretation of Statutes*, 8th ed. 39), and the section itself is worded in the singular ('every mortgage . . . shall rank according to its date of registration').

- (4) Where the First Mortgage is not Protected by a Deposit of Documents Relating to the Legal Estate affected but the Second is thus Protected.

Two cases must be considered.

(a) *Where the first mortgage is registered before the second is made*, the first ranks for priority 'according to its date of registration' (section 97), *i.e.* prior to the second mortgage. Section 13 (2) has no application. However, this simple position may be affected by section 13 of the Law of Property Act, 1925. This provides that 'this Act shall not . . . affect any question arising out of or consequent upon any omission to obtain or any other absence of possession by any person of any documents relating to a legal estate in land'. Consequently, if the first mortgagee has been grossly negligent in failing to obtain possession of the deeds, this section may be held to exclude the operation of section 97, and leave the old law to operate, with the result that the second mortgagee has priority. The first mortgagee cannot plead that under section 198 (1) of the Law of Property Act, 1925, registration of his mortgage automatically operated as notice to the second mortgagee and so prevents the latter from saying that he was deceived by the mortgagor's possession of the deeds, for the operation of this section also is excluded by section 13 of the Law of Property Act, 1925. Nevertheless, if in fact the second mortgagee searched and discovered the existence of the first mortgage, or in any other way received notice of it before making his mortgage, he probably would not be permitted to assert that the first mortgagee had lost his priority by gross negligence. A mortgagee who did not search the register might be said to have failed to make those inquiries and inspections which a prudent man would have made, and thus to have constructive notice of all that a search would have revealed. Further, the provision in section 13 (2) that a land charge shall be void against a purchaser unless it is registered leads to the inference that, if it is registered, it is binding on a purchaser.

This seems to apply equally where there is estoppel in relation to the deeds; and doubtless fraud would postpone the first mortgagee.

(b) *Where the first mortgage was not registered when the second was made*, the second has priority. For (i) the first mortgage is void against the second for want of registration (section 13 (2)); and (ii) even if the first mortgage is ultimately registered, it will take priority from the date of registration, *i.e.* after the second mortgage.

Conclusion.

It seems a little optimistic to say that 'since the Property Acts of 1925 and particularly the Land Charges Act 1925, difficult questions of priorities are less likely to arise'.³ It is true that there were difficulties under the old system which have not been adequately discussed in the necessarily brief account given here, but even if the new system is regarded as an improvement on the old, few will dispute the statement that the present position is far too complicated and uncertain. One cannot expect every statute to be proof against wilful misinterpretation, but the difficulties discussed in this article can hardly be said to be in that category. As one learned writer says, 'we have not yet arrived at a harmonious and simple system'.⁴ The rules which governed priorities before 1926 have been partially overlaid by statutory provisions which provide⁵ headaches for students and traps for practitioners. Almost any simple and straightforward system would be an improvement. Here is one possibility: doubtless improvements might be made and alternatives put forward.

- (i) No mortgage shall be registrable as an estate contract;
- (ii) All mortgages, whether protected by a deposit of documents or not, shall be registrable either as puisne mortgages⁶ or as general equitable charges;
- (iii) Section 13 (2) shall play no part in determining priorities, which in all cases shall be determined according to the principles of section 97 alone⁷;
- (iv) All unregistered mortgages shall rank *pari passu*.

This scheme would be less convenient for mortgagees who obtain the deeds, but a little inconvenience is preferable to uncertainty and possibly hardship. Although such a solution was perhaps not possible when the 1925 legislation was passed, the introduction of priority notices and the protection given by official searches by the Law of Property (Amendment) Act, 1926, has made it practicable, and it is clear that until there is either legislation or litigation on the subject, it will remain open to speculation.

³ J. W. Brunyate, note to Maitland, *Equity*, 2nd ed. 137: cf. the *dictum* by Astbury J. on another point, 'Apart from the simplifying statutes of 1922, 1924 and 1925 the matter would be perfectly plain' (*Re King's Theatre, Sunderland* [1929] 1 Ch. 483 at 490).

⁴ J. M. L. in 65 L. J. News. 489.

⁵ Perhaps 'ought to provide' would be more appropriate in some cases.

⁶ The name 'puisne mortgage' would thus become unsuitable, and class C (i) land charges might instead be called 'legal mortgages'.

⁷ 'S. 97 of the Law of Property Act seems to be appropriate to pecuniary charges, and s. 13 of the Land Charges Act to other land charges': J. M. L., 61 L. J. News. 429.

ADDENDUM TO THE TABLE OF ENGLISH REPORTS.

GLANVILLE L. WILLIAMS.

IN many of the newer law libraries the English Reports Reprint is the only series covering cases before 1866. Even if, as in the older libraries, the original reports are themselves available, they are frequently so out of the way that it is not normally worth the trouble to consult them. Unfortunately, however, a reader who finds some abbreviated reference to a case decided before 1866 cannot be sure that it will be found in the Reprint. Despite the claim in the Index Chart that the Reprint is a 'complete verbatim re-issue of all the decisions of the English Courts prior to 1866', it does not include all the collateral reports, nor does it include the specialized reports of Bail Court, Bankruptcy, Railway and Canal, Election, Registration, Local Government, and Patent and Trade Mark cases.¹ Thus the inexpert worker may waste some time before he discovers that, for instance, 'D. & R.' is not necessarily to be found in Volume 171, or that 'Moo. J. B.' is not a misprint for 'Moo. K. B.' and is not to be found in Volume 72, or, for the matter of that, any other volume.

After some experiences of this sort the student may be apt to give up the search for any case in the English Reports if his reference is not clearly included in the Chart supplied by the publishers. But if so he will miss many authorities that he might have found, for the abbreviations given in the Chart are by no means complete. Thus he will fail to trace the abbreviation 'A. Moo.', which effectually conceals a reference to the first volume of Bosanquet and Puller's Reports after p. 470. Gradually he may come to learn that several of the old reports used to be current under more than one title, and that these alternative titles are not noticed in the Chart. The series now known as 'Modern Reports' is a particular offender in this respect, for the various Parts are to be found cited in at least

¹ For a complete list of what is and is not included see Sweet & Maxwell's *Guide to the Law Reports and Statutes* (1929) 35—42. Two misprints in the E. R. Chart may be mentioned. Littleton is in Volume 124, not 120. And Volume 139 covers 14—18 C. B., not merely 14—16.

eighteen different ways, of which only one is given in the Chart. Again, a reference to '1 Cro.', '2 Cro.' or '3 Cro.' often causes difficulty to the user of the English Reports. According to the lettering on the spine of Volumes 78 and 79, '1 & 2 Cro.' are Cro. Eliz., '3 Cro.' is Cro. Jac., and '4 Cro.' is Cro. Car. But this has never been the standard mode of citation. Originally Cro. Jac. and Cro. Car. were published before Cro. Eliz., and the three volumes were therefore labelled '1', '2', '3', in that order. Later, however, the regnal order of time asserting itself, they became '2', '3', and '1' respectively. It was not until 1790-2 that Cro. Eliz. was published as two volumes, and I cannot find that this has since affected the mode of citation.

For these reasons there has recently been hung up in the Squire Law Library, Cambridge, a list of abbreviations additional to those given in the English Reports Chart, with references to the corresponding volume of the Reprint, together with one or two corrections to the Chart. In case this list may be of interest to librarians and readers in other libraries, as well as to law students at Cambridge after they have gone down, a copy of it is here given.

Abbreviation.	Vol. in E. R.	Abbreviation.	Vol. in E. R.
A. B. (= Anonymous, at the end of Benloe)	73	C. & P. (= Car. & P. or Cr. & Ph.)	171-3 or 41
A. & E. N. S. (= Q. B.)	113-18	C. t. N. (= Eden)	28
A. Moo. (= 1 Bos. & Pul. 471 ff.)	126	Cas. B. R. [t. W. III] (= 12 Mod.)	88
Abr. Ca. Eq. (= Eq. Ca. Abr.) ..	21-2	Cas. C. R. (= 12 Mod.)	88
Annaly (= Cas. t. Hard.)	95	Cas. Ch. (= 9 Mod.)	88
B. (= Beavan)	48-55	Cas. K. B. t. Hardwicke (= Kel. W.)	25
B. C. C. (= Bro. C. C.)	28-9	Cas. L. Eq. (= 10 Mod.)	88
(Or = Lowndes and Maxwell Bail Court, not in E. R.)		Cas. t. Hard. by Lee (= Cas. t. Hard.)	95
B. M. (= Burrow's Mansfield) ..	97-8	Cas. t. Maccl. (= 10 Mod.)	88
B. N. C. (= Bing. N. C. or B. N. C.*)	131-3 or 73	Cas. t. Q. Anne (= 11 Mod.)	88
B. R. H. (= Cas. t. Hard.)	95	Chan. Rep. C. (= Rep. Ch.)	21
Bell. Cas. t. H. VIII (=		Colquit' (= 1 Mod.)	86
"B. N. C." in the E. R., but arranged differently*)	73	Cro., 1, 2, 3. (Note that these may be either Cro. Eliz., Cro. Jac. and Cro. Car. respectively or Cro. Jac., Cro. Car. and Cro. Eliz. respectively; see Wallace's <i>Reporters</i> , 4th ed. 204)	78-9
Bell. Cas. t. R. II (= Bellewe) ..	72	Croke (= Cro. Eliz., Jac. and Car., or sometimes Keilwey) ..	78-9
Belt Bro. (= Bro. C. C.)	28-9		or 72
Belt Supp. (= Ves. Sen. Supp.)	28	D. & E. (= T. R.)	99-101
Benl. (= Benl.). [For Benloe and Dalison see Wallace's <i>Re- porters</i> , 4th ed. 118, n. 2]	73	D. & J. (= De G. & J.)	44-5
Benne (= 7 Mod.)	87	Dal. (= Ben. & D.). [See Wal- lace's <i>Reporters</i> , 4th ed. 118, n. 2]	123
Bl. R. (= Bl. W.)	96		
Bos. & Pul., 4, 5 (= Bos. & Pul. N. R.)	127		
C. C. C. (= Choyce Cases)	21		
C. & M. (= Car. & M. or Cr. & M.)	174 or 149		

Addendum to the Table of English Reports. 263

Abbreviation.	Vol. in E. R.
Den. & P. (= 2 Den.)	169
Dow. (= either Dow, 3 E. R., or Dowling's Practice Cases, not in E. R.)	
Dow N. S. (= Dow & Cl.)	6
Dow. & Ry. (= Dowl. & Ry. N. P.)	171
(Or = Dowl. & Ry. K. B., not in E. R.)	
Ecc. & Ad. (= Spinks)	164
Eq. Cas. (= 9 Mod.)	88
Eq. Rep. (= Gilb. Rep.)	25
(Or = Common Law and Equity Reports, 1853-5, not in E. R.)	
Farresley (= 7 Mod.)	87
Fin. H. or Finch (= Rep. t. Finch)	23
Fin. T. (= Prec. Ch.)	24
Forr. (= either Forrest or Cases t. Talbot)	145 or 25
Gold. (= Gould.)	75
H. Bl. (= Bl. H.)	126
Hard. (= Kel. W.)	25
Hub. (= Hob.)	80
Hurl. & Gord. (= 10, 11 Ex.) ..	156
J. Bridg. (= Bridg. J.)	123
J. Kel. (= Kel. J.)	84
Jones, 1 (= Jones, W.)	82
Jones, 2 (= Jones, T.)	84
Kel., 1 (= Kel. J.)	84
Kel., 2 (= Kel. W.)	25
Ld. Ken. (= Keny.)	96
Ld. Ray. (= Raym. Ld.)	91-2
Lee t. Hard. (= Cas. t. Hard.) ..	95
Leigh (= Ley)	80
Little Brooke (= "B. N. C." in the E. R., but arranged differ- ently*)	73
Luc. (= 10 Mod.)	88
M. & G. (= Mac. & G., 6 Madd., or Man. & G.) .. 41-2, 56, or 133-5	
M. & R. (= Maccl. & R. or M. & Rob.)	9 or 174
(Or = Manning & Ryland K. B., not in E. R.)	
M. & S. (= Mau. & Sel.)	105
(Or = Moore & Scott C. P., not in E. R.)	
Maccl. (= 10 Mod.)	88
Mad. & Gel. (= 6 Madd.)	56
Man. Gr. & S. (= C. B.)	135-9

Abbreviation.	Vol. in E. R.
March (= B. N. C.)	73
(A reference to March's New Cases may be either to this March or to March N. R., 82 E. R.)	
Mo. (= Moo. K. B., Moo. P. C., or Mod.)	72, 12-15, or 86-8
(Or = Moore's C. P., not in E. R.)	
Mod. Cas. (= 6, 7 Mod.; 2 Mod. Cas. sometimes = 7 Mod., some- times 8 Mod.)	87-8
Mod. Ca. L. & Eq. (= 8, 9 Mod.)	88
Mod. Ca. per Far. (= 7 Mod.) ..	87
Mod. Ca. t. Holt (= 7 Mod.)	87
Moo. (= Moo. K. B., Moo. P. C., or Mood.)	72, 12-15, or 168-9
(Or = Moo. C. P., not in E. R.)	
Moo. A. (= 1 Bos. & Pul. 471 ff.)	126
Moo. F. (= Moo. K. B.)	72
N. Benl. (= Benl.) [See Wallace's <i>Reporters</i> , 4th ed. 118, n. 2]	73
N. C. C. (= Y. & C. C. C.)	62-3
N. R. (= B. & P. N. R.)	127
(Or = The New Reports, not in E. R.)	
Nelson's Rep. (= Nels. or Rep. t. Finch)	21 or 23
New Benl. (= Benl.) [See Wallace's <i>Reporters</i> , 4th ed. 118, n. 2]	73
New Cas. Eq. (= 8, 9 Mod.)	88
New Rep. <i>See</i> N. R.	
O. Bridg. (= Bridg. O.)	124
Old Benl. (= Ben. & D.) [See Wallace's <i>Reporters</i> , 4th ed. 118, n. 2]	123
Pea., 2 (= Peake Add. Cas.)	170
Pet. Br. (= "B. N. C." in the E. R., but arranged differ- ently*)	73
Q. B. R. (= Q. B.)	113-18
R. & M. (= Russ. & My. or Ry. & Mood.)	39 or 171
Rep. (1, 2, etc.) (= Co. Rep.) ..	76-7
Rep. Cas. Eq. (= Gilb. Rep.) ..	25
Rep. Eq. (= Gilb. Rep.)	25
Rep. Q. A. (= 11 Mod.)	88
Rep. of Sel. Cas. in Ch. (= Kel. W.)	25

* The volume called "Brook's New Cases" in the E. R. should for preference be designated "March". It is in effect a reprint of Brook's New Cases (otherwise called Bellewe's Petit Brooke, Cases tempore H. VIII), but it is arranged alphabetically, whereas the original work is arranged chronologically.

Abbreviation.	Vol. in E. R.	Abbreviation.	Vol. in E. R.
Rep. t. Hard. (= Cas. t. Hard.)	95	T. Raym. (= Raym. T.)	83
Sel. Cas. Ch. (= Sel. Cas. t. King)	25	W. Bl. (= Bl. W.)	96
T. Jo. (= Jones, T.)	84	Welsb. H. & G. (= Exch.)	154-6
T. R. N. S. (= East)	102-4	Williams P. (= P. Wms.)	24

For other abbreviations the student may be referred to Sweet & Maxwell's *Law Finder*, or Jelf, *Where to Find your Law*, or any volume of Halsbury's *Laws of England*. As a final suggestion, it might be helpful if, at the end of or incorporated in the above list, shelf references could be added to the volumes of the old reports, not included in the English Reports Reprint, that are in other parts of the library.

NOTES ON RECENT CASES.

CONFLICT OF LAWS—BILL OF LADING—CONTRACT CONTRARY TO NEWFOUNDLAND CARRIAGE OF GOODS BY SEA ACT, 1932—CLAUSE IN CONTRACT MAKING ENGLISH LAW APPLICABLE—PROPER LAW OF THE CONTRACT.

Vita Food Products, Inc. v. Unus Shipping Co., Ltd.
[1939] A. C. 277.

THE appellants were the consignees, in New York, of herrings shipped from Newfoundland on the respondents' ship. On its voyage to New York, the ship ran ashore, through the negligence of the master, in Nova Scotia, where the ship was registered and the action tried. The herrings were salvaged, the appellants receiving them in New York in a damaged condition. The bills of lading issued in Newfoundland contained a clause exempting the owners from liability for the negligence of master or mariners. The Newfoundland Carriage of Goods by Sea Act, 1932, incorporates The Hague Rules, 1922—1923. By section 3 of the Act, every bill of lading "shall contain an express statement that it is to have effect subject to the provisions of the said rules as expressed in this Act". The bills of lading did not include the clause paramount. The provisions of the bills of lading or of the Act would have exempted the respondents from liability (p. 286) but the appellants contended that the failure to comply with section 3 of the Act prevented the respondents from relying on the exemption from liability for negligence; and that they were liable as common carriers.

A clause in the bills provided that the contract should be governed by English law. The appellants argued that the contract had no connection with English law, and in certain circumstances was to be governed by the Harter Act and the Canadian Water Carriage of Goods Act, 1910: the case should be governed by the law of Newfoundland.

Lord Wright delivered the judgment of the Judicial Committee, holding that the proper law of the contract was English, and that the clause in the bills of lading exempting the shipowners from liability was a good defence. At p. 290 approval was expressed of Lord Atkin's remarks in *R. v. International Trustee for Bondholders* [1937] A. C. 500, 529. 'Their [*sc.* the parties'] intention will be ascertained by the intention expressed in the contract if any, which will be conclusive.' Lord Wright continued, that where there is an express choice of the law of the contract, 'it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and . . . there is no reason for avoiding the choice on the ground of public policy'. Section 3 of the Newfoundland Act was held to be directory and not mandatory. Since the contract was neither immoral nor positively forbidden by the Newfoundland law, English law must be applied: the exemptions in the bills of lading were therefore a good defence to the appellants' action.

The Court dissented from the decision of the Court of Appeal in *The Torni* [1932] P. 27. While that case must remain (at any rate up to the Court of Appeal) the leading case on this subject, the present decision of the Judicial Committee must have greatly impaired its authority.

K. S.

CONTRACT — DAMAGES — BANKER MISTAKENLY DISHONOURING CUSTOMER'S
CHEQUE — CUSTOMER NOT A TRADER — ONLY NOMINAL DAMAGES
RECOVERABLE UNLESS SPECIAL DAMAGE PROVED.

Gibbons v. Westminster Bank, Ltd. [1939] 2 K. B. 882.

IN this action for breach of contract the defendants admitted that they had dishonoured the plaintiff's cheque whilst the balance of her current account was sufficient to meet it. The plaintiff, who was not a trader, did not plead special damage.

Lawrence J. held that the general rule as to measure of damages applied and that the plaintiff, not having pleaded special damage, could recover nominal damages only. The exception to the general rule which entitled a trader whose cheque had been wrongfully dishonoured to recover substantial damages without alleging or proving actual damage did not extend to a customer of a bank who was not a trader. The latter was not entitled to substantial damages unless the damage he had suffered was pleaded and proved as special damage.

This case, though treated by Lawrence J. as covered by the authorities, is in fact the first English decision which establishes this point. In the cases which were cited in argument the plaintiff had always been a trader except in one Australian case where he was a farmer. The present decision makes it clear that the customer of a bank who is not a trader cannot, for the wrongful dishonour of his cheque, recover substantial damages without pleading and proving special damage, but it still leaves open the question whether damage resulting from loss of reputation even when pleaded and proved will (in the absence of a special undertaking by the banker to maintain his reputation) entitle him to substantial damages: two cases referred to by Lawrence J. (*Marzetti v. Williams* (1830) 1 B. & Ad. 415 and *Rolin v. Steward* (1854) 14 C. B. 595) contain *dicta* in favour of such damages, but a passage in *Smith's Leading Cases* (13th ed.) vol. ii, at p. 574, which was also mentioned by the learned Judge, quotes Lord Atkinson's speech in *Addis v. Gramophone Co., Ltd.* [1909] A. C. 488, 495, in support of the view that the somewhat anomalous rule which allows substantial damages for injury to credit resulting from the breach of an ordinary commercial contract, is not to be extended beyond its present limits.

H. P. R.

CONTRACT—INNKEEPER AND GUEST—NEGLIGENCE AND BREACH OF WARRANTY BY INNKEEPER—DUTY OF INNKEEPER TOWARDS GUEST TO KEEP PASSAGE LIGHTED AT ALL REASONABLE HOURS.

Campbell v. Shelbourne Hotel, Ltd. [1939] 2 K. B. 534.

WHILE looking for the lavatory at 11.20 P.M. in an unlighted passage outside his room in the defendants' hotel, the plaintiff opened a door, which he believed to be that of the lavatory, stepped forward and fell down a flight of steps to a basement, and sustained injuries.

The plaintiff was awarded £382 3s. and costs, on the ground of negligence, or breach of warranty, or both.

Cassels J. referred to the classification, invitees, licensees and trespassers, and said that the plaintiff was an invitee, 'and to him the defendants owed the highest duty to take reasonable care that the premises were safe' (p. 537). It was only later in his judgment that the learned judge also noted that the plaintiff was there under a contract (pp. 540—541). (Note that the duty to an invitee under a contract is higher than that towards an ordinary invitee.) In following *Maclenan v. Segar* [1917] 2 K. B. 325, in which the rule in *Francis v. Cockrell* (1870) L. R. 5 Q. B. 501, had been applied, with a slight addition to the headnote (McCardie J. at p. 333), which would have been unnecessary had *Readhead v. Mid. Ry.* (1869) L. R. 4 Q. B. 379 of the previous year been more closely followed, his Lordship quoted the headnote: 'By reason of the contractual relationship existing between an innkeeper and a guest in the inn, there is an implied warranty by the innkeeper that the inn premises are, for the purpose of personal use by the guest, as safe as reasonable care and skill on the part of any one can make them.' Later he said (p. 542): 'I hold in this case that it was the duty of the proprietors of this hotel to keep this passage-way reasonably lighted at the hour of 11.20 P.M. in an hotel in London, when the hotel was patronised by customers whose hour of retirement for the night might well have been regarded as reasonable at any rate until midnight. The failure to discharge that duty, by leaving that passage-way dark, led the plaintiff to incur the damage which he suffered.' He queried the result if the hour had been 3.0 A.M. (p. 537).

In distinguishing (at p. 538) *Walker v. Midland Ry.* (1886) 55 L. T. 489, he quoted Lord Selborne L.C. (at p. 490). The respondents 'did not so conduct their hotel as to drive their guests to grope about in dark places, . . . in order to find water-closets.' The corridor and closets 'were kept properly lighted at night'. He also pointed out that there the deceased was exploring a dark room in which he had no business to be. This was also the case in *Lee v. Luper* [1936] 3 All E. R. 817. If the plaintiff in the instant case had begun going down the steps and then fallen it might have been different.

In reference to *Wilkinson v. Fairrie* (1862) 1 H. & C. 633, his Lordship said (p. 538): 'I should distinguish that case from this by holding that it certainly was the duty of the defendants in this case to light that passage.'

Held, also that there was no contributory negligence on the part of the plaintiff in failing to call a porter by bell or telephone, to turn on the light.

I. R. D. B.

CONTRACT—MASTER AND SERVANT—WORKMAN HAS A RIGHT TO WAGES DURING ABSENCE FROM WORK THROUGH SICKNESS—‘SICK BENEFIT’ UNDER THE NATIONAL HEALTH INSURANCE ACTS IS ADDITIONAL AND NOT ALTERNATIVE TO WAGES—RIGHT TO WAGES DURING SICKNESS DEPENDS ON TERMS OF PARTICULAR CONTRACT.

Marrison v. Bell. [1939] 2 K. B. 187.

Petrie v. Mac Fisheries, Ltd. [1940] 1 K. B. 258.

Hancock v. B.S.A. Tools, Ltd. [1939] 4 All E. R. 538.

Marrison v. Bell was a decision of the Court of Appeal and the general principle which it laid down was explained further by the decisions in *Petrie's Case* and *Hancock's Case*. M. was employed by B. on a weekly basis and was insured against sickness under the National Health scheme. He was absent from work through illness for some months, during which time he received ‘sick benefit’, when B. gave him a week's notice. M. then claimed £56 as the sum due to him in wages during his illness calculated up to the time when he had been given notice:—*Held*, M. was entitled to recover.

The points upon which the case was decided were: (1) had M. a right at Common Law to wages when he was absent from work through sickness? (2) if he had such a right had he forfeited it by accepting ‘sick benefit’ under the National Health scheme? Scott L.J. (in whose judgment the rest of the Court concurred), after examining a series of cases, came to the conclusion that a Common Law right to wages undoubtedly existed until the contract was terminated. He distinguished two cases, *Niblett v. Midland Ry.* (1907) 96 L. T. 462 on the ground that there the employee had agreed to accept payment during sickness from the company's friendly society instead of wages, and *Elliott v. Liggins* [1902] 2 K. B. 84 on the ground that benefits under the Workmen's Compensation Acts during sickness were payable in place of wages. After a brief, but very interesting, examination of the National Health Insurance Acts up to the one of 1936, the learned Lord Justice held that, unlike the Workmen's Compensation Acts, these Acts made their provisions for sickness additional to wages and not in substitution for them.

Throughout this case, as was pointed out later by Atkinson J. in *Petrie's Case*, it was assumed that the contract in question was one for which the consideration given for wages was faithful service, not actual work done, and when contracts of a different nature came to be considered by the Courts, important exceptions to the general rule adopted by Scott L.J. were made plain. In *Petrie's Case* the employer had exhibited a notice, to which the employee was held to have assented, to the effect that employees absent through sickness would be paid half wages up to twenty-one days in any one year as a matter of grace. The Court of Appeal held that this clearly excluded the right to wages during sickness, held to exist in *Marrison v. Bell*. In *Hancock's Case* a workman was paid weekly but his wages were calculated from the number of hours he worked, and his employment was determinable by one hour's notice. It was held that the decision in *Marrison v. Bell* gave no right to such an employee to claim wages during sickness as the contract was made on the terms of payment for work done, and if no work was done there could be no claim to payment.

Other notes on *Marrison v. Bell* will be found in 55 L. Q. R. 353 and Modern Law Review, Oct. 1939, p. 162.

R. R. P.

CONTRACT—SALE OF GOODS—ORAL ORDER BY AGENT OF BUYER—ACCEPTANCE WITHIN SECTION 35 OF SALE OF GOODS ACT, 1893, HELD TO MAKE COMPLIANCE WITH SECTION 4 UNNECESSARY.

Re a Debtor (No. 38 of 1938). [1939] Ch. 225.

THIS was an appeal by a debtor from a receiving order, on the ground that the Registrar had no evidence of indebtedness to the respondents in a liquidated sum of at least £50.

The debtor's authorized agent gave an oral order to the respondents to make goods and to deliver them to the debtor's premises. The respondents accepted orally. The debtor later recorded the order and the price—£65 14s. 2d.—in his day book and ledger. The goods were delivered March 18, 1938, and were received by an employee of the debtor; they were left on the premises. On March 29, 1938, the debtor executed a deed of assignment, not expressly excluding these goods from the property assigned, for the benefit of his creditors.

If the dealings with the goods did not create an enforceable contract the receiving order could not be made, the debtor's further indebtedness to the respondents being under £50:—*Held*, by Farwell and Morton, JJ., that they did create an enforceable contract.

The appellant argued that though the fact that the goods had been allowed to remain on his premises without his doing anything about them might constitute acceptance within section 35 of the Sale of Goods Act, 1893, it did not constitute acceptance within section 4 (3) of that Act, which requires that the debtor should have done something showing that he recognized that the goods were the subject-matter of a pre-existing contract of sale.

The respondents argued that acceptance under section 35 of the Sale of Goods Act, 1893, must equally be acceptance under section 4 (1), and referred to Bigham J. in *Taylor v. Great Eastern Ry.* [1901] 1 K. B. 774, 778, 779. They urged that the whole question of acceptance might be put thus: is there evidence that the person who took the goods took as a buyer?

The Court said (at p. 231): 'Once there has been an acceptance within section 35, the requirements of section 4 have been complied with and it is unnecessary to consider sub-section 3.' The appellant's argument necessitated the reading of 'only' before 'when the buyer does any act', in section 4 (3), which is unwarranted. Section 4 (3) and section 35 give different methods by which the contract may be made enforceable; they are not contradictory.

The appeal was dismissed and it appears rightly so. The Act must be read as a whole and the reading of section 4 (3) which the appellant required would make section 35 meaningless and of no effect.

G. F.

CRIMINAL LAW—PROCUREMENT OF MISCARRIAGE—DEFENCE THAT OPERATION WAS TO SAVE MOTHER'S LIFE—CONTINUANCE OF PREGNANCY WOULD PROBABLY BRING ABOUT PHYSICAL AND MENTAL WRECK OF MOTHER.

R. v. Bourne. [1939] 1 K. B. 687.

B., A NOTED obstetrical surgeon, performed in a London hospital an operation of abortion on a girl of fourteen, who was pregnant in consequence of an exceedingly violent rape. He was prosecuted under the Offences against the Person Act, 1861, s. 58, for unlawfully procuring miscarriage.

The accused asserted that it was his duty to operate, since he considered the continuance of the pregnancy would probably cause serious injury to the girl. A specialist in medical psychology confirmed this belief.

The jury acquitted B.

In the summing-up Macnaghten J. commented on the Infant Life (Preservation) Act, 1929, s. 1 (1), which provides that no person shall be guilty of child destruction 'unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother'. The learned judge said that that proviso applied equally to section 58 of the Offences against the Person Act, 1861, and expressed what had always been the law concerning the procuring of an abortion.

The jury were told that what they had to decide was whether the Crown had satisfied them beyond reasonable doubt that the act which the accused did was not done in good faith 'for the purpose only of preserving the life of the girl', and if they were not so satisfied they should acquit.

The vital question was—what meaning should be given to the words 'for the purpose of preserving the life of the mother'? On this point Macnaghten J. declared (at pp. 693–694): 'Those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.'

The verdict was widely approved, particularly by the medical profession.

A. C. H. B.

INTERNATIONAL LAW—RECOGNITION *De Facto*—REQUISITION OF SHIP BY BOTH *De Jure* AND *De Facto* GOVERNMENTS—POSSESSION—IMPLEADING A FOREIGN SOVEREIGN STATE.

The Arantzazu Mendi. [1939] A. C. 256.

AFTER the capture of Bilbao by General Franco's forces, the Spanish Republican Government by decree requisitioned the *Arantzazu Mendi*, a Spanish ship registered at Bilbao, but then on the high seas. On her arrival in London, the ship's owners issued a writ *in rem* for possession of the vessel and she was arrested. In March 1938 the ship was

requisitioned by the Nationalist Government, to which decree the owners declared that they submitted freely and withdrew their writ. Thereupon the Republican Government issued another writ against the ship, claiming to have possession adjudged to them. The Nationalist Government moved to set aside this second writ on the ground that it impleaded a foreign sovereign State.

The House of Lords, affirming the Court of Appeal and Bucknill J., set aside the writ issued by the Republican Government. Apart from declaring that the writ was bad in form, by purporting to make a chattel defendant and not the persons interested in it, two independent questions were raised: (i) Did the Nationalist Government represent a sovereign State entitled to jurisdictional immunity? (ii) If so, was it impleaded in the action by having a sufficient possession in the ship?

(i) The reply of the Foreign Office to the letter of the trial judge rather ambiguously stated in effect that the Republican Government was recognized as the '*de jure*' government of Spain, whilst the Nationalist Government was recognised as the '*de facto*' government of the Basque Provinces. This statement was held to be conclusive, and therefore, as the Court maintained that 'there is no difference for present purposes between a recognition of a State *de facto* as opposed to *de jure*' (p. 265), the Nationalist Government was entitled to immunity. Lord Atkin justified this by asserting (*ibid*): 'All the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law exist. . . . The non-belligerent State which recognizes two Governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal Courts.'

(ii) Their Lordships, having decided that the ship remained in the legal possession of its owners during the period of arrest by the Admiralty Marshal (his right being that of 'custody'), held, on the principles of *The Cristina* [1938] A. C. 485, that the Nationalist Government were in sufficient possession at the material date, by reason of the owners and the master agreeing to hold the ship at the disposition of that government.

The decision, it is urged with all respect, flouts the principle of the legal consequences of the distinction between *de facto* and *de jure* recognition, namely, that the former is legally equivalent to the latter only with regard to property and acts within the territory controlled by the *de facto* authority.

G. J. M.

PERSONAL PROPERTY — INNKEEPER — LIABILITY FOR LOSS OF GUEST'S
PROPERTY BY THEFT—QUESTION OF GUEST'S NEGLIGENCE.

Shacklock v. Ethorpe, Ltd. (1939) 55 T. L. R. 895.

Mrs. S. was a guest in a small provincial hotel. She was keeping in her room some jewelry, which was locked in a jewel-case. During her temporary absence her jewels were stolen. She sued to recover the amount of her loss from the hotel owners.

The following facts are important: (1) the appellant had not locked her room; (2) the appellant erroneously believed that there was no safe on the premises.

Greaves-Lord J. decided for Mrs. S. The Court of Appeal reversed his decision, but the House of Lords restored the original judgment.

No previous case concerning innkeepers' liability had reached the House of Lords. By common law an innkeeper, whether negligent or not, is responsible to his guests if any of their goods are lost or stolen on his premises. But he escapes liability if he can show that 'the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances': *per* Erle J. in *Cashill v. Wright* (1856) 6 E. & B. 891, 900.

The point, therefore, was whether the appellant had taken the ordinary care of a reasonable person in her position. The respondent endeavoured to prove that the appellant had been negligent in two respects: (a) in not locking her door; (b) in not depositing her jewelry in the office. Regarding (a), the fact of not locking her door was not by itself proof of negligence and regard must be had to 'the state of society at the time and place. What would be prudent in a small hotel, in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol' (p. 897). In the circumstances, the House of Lords decided that the appellant was not negligent. Regarding (b), the Court of Appeal considered the appellant negligent in keeping her jewelry in her room when she might quite easily have taken it down to the office and handed it in and asked that it should be taken care of while she was out. The House of Lords, however, mainly relying on the fact that Mrs. S. did not know that a safe existed in the hotel and that the jewels were not exceptionally valuable, decided that the appellant had not been negligent in this respect either.

The decision establishes that it is the innkeeper's duty to notify his guests that valuables should not be kept in the rooms but should be deposited in a safe place. In the absence of such notice the guest is not negligent in keeping them in his room and the innkeeper is liable for their loss.

This strict common law liability of an innkeeper is limited to £30 by the Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), provided the first section of this Act is conspicuously displayed in the hotel, which, however, had not been done in this case.

K. L. G.

TORT—ALLEGED INDUCEMENT TO BREAK CONTRACT—ALLEGED CONSPIRACY TO THAT END—HONEST MISTAKE ON PART OF DEFENDANTS—WHETHER PROOF OF DAMAGE IS REQUIRED.

British Industrial Plastics, Ltd. v. Ferguson. (1939) 160 L. T. 95.

D., a FORMER employee of the plaintiff company, offered a process of manufacture to F., the managing director of the defendant company. F. saw that the process might be valuable, but feared it might be secret. He therefore refused to have it revealed to him, but referred D. to eminent patent agents, in the foolish but honest belief that if the patent agents reported that the process was patentable it could not be secret. The agents declared it patentable; and in due course a final specification was filed and the process was revealed to the world. The process was in fact the

secret of the plaintiffs, and in disclosing it D. committed a breach of his contract with them. The plaintiffs were awarded substantial damages against D.

They also brought an action against F. and his company on the grounds (1) that they had induced D. to break his contract and (2) that they had conspired with D. to procure that result. Porter J. (as MacKinnon L.J. put it) 'vindicated the honesty of F. at the expense of his intelligence'; he found that F. had acted ineptly but *bona fide*; and he gave judgment for the defendants.

The Court of Appeal unanimously affirmed this decision. Slessor L.J. said (at p. 98): 'The general principle is that a violation of legal right committed knowingly is a cause of action (*per* Lord Macnaghten in *Quinn v. Leathem* [1901] A. C. at p. 510).' But in the present case Slessor L.J. held that the defendants had not acted 'wilfully and knowingly either in the sense that they acted with actual knowledge that D. would break a contract, or in the sense that they refused themselves that knowledge by wilfully shutting their eyes' (at p. 97).

It was contended that, at least in telling D. to reveal the process to the patent agents, F. willingly and knowingly induced him to break his contract with the plaintiffs. Slessor L.J. held that in the circumstances F. was justified. Had there been no justification, he held that the plaintiffs would not have been obliged to prove special damage. He said (at p. 99): 'The damages are damages at large: *per* Lord Esher M.R. in *Exchange Telegraph v. Gregory* [1896] 1 Q. B. at p. 153.' MacKinnon L.J. did not dissent from this proposition, but applied it differently to the facts.

The charges of inducement and conspiracy to break a contract were scarcely distinguished. Professor Lauterpacht says in 52 L. Q. R. 494, 508: 'There is no such thing in law as a conspiracy to break a contract.' At any rate, for third parties there is no practical difference between inducement and conspiracy to break a contract; and in this case MacKinnon L.J. expressly stated: 'I think the same considerations apply to either form of claim.'

This case generously recognizes the defence of mistake in this tort, and establishes the proposition that negligent conspiracy and unintentional inducement to break a contract are wrongs unknown to the law.

G. E.

TORT—DANGEROUS CHATTEL—THING DANGEROUS IN ITSELF—SALE OF 'SAFETY' PISTOL AND BLANK AMMUNITION TO BOY AGED TWELVE—DUTY TO WARN PURCHASER OR REFRAIN FROM SALE—INJURY TO BYSTANDER—LIABILITY OF SELLER—FIREARMS ACT, 1937.

Burfitt v. Kille. [1939] 2 K. B. 743.

THE defendants, proprietors of a toy and fancy goods shop, sold a 'safety' pistol and 100 blank cartridges to A, a boy aged twelve. While playing with the pistol, A fired it and injured his playmate, the plaintiff B, a boy aged about ten; the cause of the accident was fouling of the pistol, for the cleansing of which the defendants had made no provision and given no instructions.

The action was for negligence and breach of statutory duty in the sale of the pistol and cartridges. Atkinson J. gave judgment for the plaintiff. He examined the question of the duty of care which a seller of chattels owes to persons other than the purchaser. There is no contractual duty. But if X places in the hands of Y a chattel belonging to a class of things dangerous *per se* in the hands of such a person as Y, a duty of care rests upon X towards not only the recipient but also towards all such persons as may reasonably be contemplated as likely to be endangered. He cited the Judicial Committee in *Dominion Natural Gas Co., Ltd. v. Collins* [1909] A. C. 640, and Lord Macmillan in *Donoghue v. Stevenson* [1932] A. C. 562, 611.

The duty is to give proper warning to the recipient where he is a competent person, or else to refrain from sale. The Court held that the pistol and cartridges constituted a dangerous combination in the hands of A, and that the duty of care as regards such chattels dangerous *per se* had been broken.

The pistol was not a firearm within the Firearms Act, 1937; but the blank cartridges were ammunition under sections 16 and 32. The sale of the cartridges was therefore a breach of the statute, under section 19 (1), which prohibits the sale of any firearm or ammunition to any person whom the seller knows or has reasonable ground for believing to be under the age of seventeen years.

C. K. C.

TORT—DANGEROUS PREMISES—LANDLORD AND TENANT—LANDLORD LIABLE FOR REPAIR—WANT OF REPAIR—KNOWLEDGE OF LANDLORD—COLLAPSE OF HOUSE ON TO ADJOINING PREMISES.

Wringe v. Cohen. [1940] 1 K. B. 229.

W., THE plaintiff, owned a shop adjoining the house of C., the defendant. C.'s house was let to a weekly tenant; C. was liable for repairs. A wall of C.'s house collapsed upon A.'s shop which stood considerably lower. C.'s house had been in bad repair for some time, but C. stated that it had been in good repair so far as he knew though he had not examined it; a builder, who had inspected the wall two years before at C.'s request, stated that it had then been in a fair state of repair.

C. admitted his liability to repair. The evidence showed that the wall had become a nuisance owing to bad repair. But C. urged that this did not establish his liability for the damage, for that would arise only if he knew, or ought to have known, of the want of repair.

The Court of Appeal affirmed judgment for the plaintiff: knowledge, on the part of the owner or occupier, of the want of repair is immaterial when damage has been caused by the bad state of repair; in this case the undertaking to repair gave control of the premises to the landlord, and therefore he had a right of entry to maintain the repair; accordingly, he should be liable.

Atkinson, J., who delivered the judgment of the Court, regarded earlier decisions as establishing that, where the defect is caused by a trespasser or is due to an undiscoverable process of nature, the owner or occupier is liable only if he knew, or ought to have known, of the danger, and allowed

it to continue. He attached great importance to *Tarry v. Ashton* (1876) 1 Q. B. D. 314, although that is not altogether a similar case; e.g. there the injured party was on the highway, while in *Wringe's Case* the injury was to private property; and the duty in the case of an artificial thing like the projecting lamp in *Tarry v. Ashton* might well be more strict than in the case of a wall, which is hardly dangerous *per se*; (Lush and Quain JJ. had decided *Tarry v. Ashton* on the principle of *Rylands v. Fletcher*). Atkinson J. also considered at length how the Court should apply the opinion of Blackburn J. in *Tarry v. Ashton* to this case. It is difficult to agree with Atkinson J. that the question of knowledge was not at least material to that opinion; for he criticizes the view of Moore J. in *Mullan v. Forrester* [1921] 2 I. R. 412, that Blackburn J. thought the defendant there ought not to have been liable for nuisance without knowledge, and says (at p. 253): '... Blackburn J. decided no such thing. Ashton had no knowledge, and had been cleared of all negligence.' The latter sentence is true, but we would respectfully suggest (as Atkinson J. himself points out earlier) that Blackburn J. did not realize that Ashton had no knowledge and that his view is valuable with reference to the facts he *thought* were before him, not to the facts as found by other members of the Court.

P. H. R.

TORT — DEFAMATION — LIBEL — TWO PERSONS OF SAME NAME — WHETHER STATEMENT TRUE OF ONE IS REASONABLY REFERABLE TO OTHER — ABSENCE OF NEGLIGENCE NO DEFENCE.

Newstead v. London Express Newspaper, Ltd. [1940] 1 K. B. 377.

THE plaintiff, Harold Newstead, was an unmarried Camberwell man of thirty years of age. He brought a libel action against the defendants, who had published in their newspaper an account of how Harold Newstead, a thirty-year-old Camberwell man, had been convicted of bigamy. No details of his address were given. The plaintiff, a hairdresser, about thirty years old, who assisted in his father's business in Camberwell Road, alleged that the words were understood by a number of people to refer to him. The defendants admitted publication but said that the words referred to another man, of whom they were true.

The jury failed to agree on the question, 'Would reasonable persons understand the words complained of to refer to the plaintiff?', but they assessed the damages, if any, at one farthing. No judgment could be entered, and the defendants appealed:—*Held*, per Sir Wilfred Greene M.R. and du Parcq L.J., that the trial judge was right in leaving to the jury the question whether a reasonable person would understand the words to refer to the plaintiff. *Held*, also (by the whole Court), that it was immaterial that the words were true of another person. 'Liability for libel does not depend upon the intention of the defamer; but on the fact of defamation': *Cassidy v. Daily Mirror Newspapers, Ltd.* [1929] 2 K. B. 331, 354. *Held*, per MacKinnon L.J., that the appeal should be allowed on the ground that the damages, if any, had been assessed by the jury at one farthing, higher than which no reasonable jury could go. The decision of Hawke J. was therefore affirmed.

It is no defence in cases of libel that the defendant honestly wrote the

words complained of intending them to refer to some person other than the plaintiff. The test is whether a reasonable person would take them to refer to the plaintiff or not. Recklessness or negligence on the part of the defendant is immaterial.

This case confirms the most generally accepted view of the principle laid down in *Hulton & Co. Ltd. v. Jones* [1910] A. C. 20, and sets an objective test for libel quite apart from the subjective intentions of the writer. The rule may appear to create hardship in certain cases, but it is desirable that the onus should be placed on the person publishing the libel, and not on the unfortunate individual who has had his good name jeopardized through no fault of his own. Any ambiguity may be avoided by more accurate or detailed reporting on the part of the newspaper.

G. D. L.

TORT—MASTER AND SERVANT—ACCIDENT IN COAL MINE—BREACH OF STATUTORY DUTY TO FENCE DANGEROUS MACHINERY—CONTRIBUTORY NEGLIGENCE A VALID DEFENCE—NO ABSOLUTE STANDARD OF CARE.

Caswell v. Powell Duffryn Associated Collieries, Ltd. [1940] A. C. 152.

C., a young workman, was killed in an accident in the defendant company's mine. Owing to the absence of eye-witnesses it proved impossible to ascertain the exact facts and causes of the accident. C.'s hand was caught between a conveyor belt and a roller, and his head was drawn up against the roller, so that his neck was broken.

C.'s mother brought an action under the Fatal Accidents Acts and also as administratrix of her son's estate to recover damages on the ground that C.'s death was caused by a breach of the statutory duty to fence exposed and dangerous parts of machinery imposed by section 55 of the Coal Mines Act, 1911. Humphreys J. gave judgment for the defendants. He was affirmed by a majority of the Court of Appeal, but the House of Lords unanimously reversed their decision. It was found as a fact that the alleged breach of statutory duty had been made out.

The principal defence set up was that C.'s own negligence materially contributed to the accident. Their Lordships, while finding on the facts of the case that the workman had not been negligent, were unanimously of the opinion that contributory negligence was a good defence to this action for breach of a statutory duty and refused to accept the view that the action for injuries caused by breach of statutory duty differs from an action for injuries caused by any other wrong. In the Australian case of *Bourke v. Butterfield & Lewis, Ltd.* (1926) 38 C. L. R. 354 it had been argued that the object of statutory safety provisions was to protect the careless as well as the careful workman and that, if the protection of the statute were denied to the careless, the aim of the Legislature would be defeated. But Lord Atkin (at p. 164) pointed out that the statute does not in terms create a cause of action, but that the injured person, as in all cases where damage is the gist of the action, must show not only a breach of duty, but that his hurt was due to the breach. Thus if his injury is caused partly by the breach of statutory duty and partly by his own negligence, he ought not to be able to recover, unless his negligence did not operate to produce the damage.

The House was further of the opinion that the standard of care expected of the workman cannot be absolute, but must vary with the circumstances of his employment, and their Lordships gave their approval to the *dictum* of Lawrence J. in *Flower v. Ebbw Vale Steel, Iron and Coal Co., Ltd.* [1934] 2 K. B. 132 at p. 140: 'I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.'

The House of Lords have thus adopted a wide view regarding the standard of care to be expected from a workman and confined the effect of their decision to a smaller class of cases than the 'reasonable man' test would have allowed. It is of interest to note that *Caswell's Case* has since been applied in *Stimpson v. Standard Telephones, Ltd.* [1940] 1 K. B. 342.

R. E. D.

TORT—NEGLIGENCE—SHOCK TO RELATIVES OF DECEASED OWING TO SIGHT OF COLLISION OF TRAM WITH HEARSE—APPREHENSION OF INJURY TO HUMAN BEINGS NOT ESSENTIAL.

Owens v. Liverpool Corporation. [1939] 1 K. B. 394.

THE defendants' tramcar through negligent driving collided with a hearse so as to threaten the ejection of the coffin it contained into the road. Four of the mourners, the mother, the uncle, the cousin, and the cousin's husband, who were following the hearse in a carriage, received nervous shocks of varying intensities from the mere sight of the accident. The trial judge dismissed the action on the ground that there had been no apprehension, or sight, of injury to a human being.

The Court of Appeal reversed this decision. MacKinnon L.J., delivering the judgment of the Court, thought that on principle recovery could not be limited to cases of apprehension of risk to human safety; but that the fact that shock follows an apprehension of danger to something less important might well be material in considering whether the allegation was proved. As the Court below was the Liverpool Court of Passage, which had found as a fact that the relatives had received shock, the Court of Appeal had no choice but to accept his finding. Leave was given to appeal to the House of Lords.

Apart from this difficulty, the decision is clearly right in principle. It extends the law as it stood in *Hambrook v. Stokes Bros.* [1925] 1 K. B. 141, for it widens the class of relatives coming within the rule, and also extends the range of objects of apprehension from living human beings to the remains of human beings. The case opens a vista of further developments, and as has been suggested it is not improbable that one limitation upon these actions will be the adoption of the view that no legal duty is owed towards unreasonably nervous people. However that may be, as MacKinnon L.J. pointed out in the present case, the possibility of unfounded claims being brought should not bar redress in meritorious cases.

T. N.

TORT—NUISANCE—HIGHWAY—RAILWAY COMPANY'S LIABILITY TO REPAIR
BRIDGE OVER HIGHWAY—NON-FEASANCE—CYCLIST INJURED BY FALL
IN RUT—PUBLIC AUTHORITIES PROTECTION ACT, 1893.

Swain v. Southern Ry. [1939] 2 K. B. 560.

THE plaintiff was riding his bicycle over a railway bridge where he knew there were pot-holes. The wheel caught in a large rut, the bicycle collapsed and he suffered serious injury. He sued the defendants for negligence, nuisance and breach of statutory duty.

Humphreys J. found that this rut was the proximate cause of the accident, the road not being in a reasonable condition for the use of traffic, and that there was no contributory negligence by the plaintiff. He held that (i) the liability of the defendants to maintain the bridge by section 46 of the Railway Clauses Act, 1845, included a liability for non-feasance; (ii) the Public Authorities Protection Act, 1893, whereby no action is maintainable against a public authority more than six months after the act, neglect or default complained of, did not apply, as the defendants were not a public authority performing a public duty; (iii) the defendants had not complied with their obligation to maintain the road in the condition in which it was constructed in 1856 and, at the date of the accident, it would have been dangerous even for vehicles of that time.

The Court of Appeal agreed with the judgment of Humphreys J. on all points. Two questions were considered at length and are of importance: (i) Whether the defendants came within the Public Authorities Protection Act. *Bradford Corporation v. Myers* [1916] 1 A. C. 242 was held to apply: here this protection was taken to cover only a definite class of persons (*i.e.* Public Authorities) of which a profit-making company was not an instance. A commercial company, such as the defendants, did not become a public authority merely because Parliament had imposed upon it a duty of maintaining bridges. (ii) Whether the defendants were liable for non-feasance, 'being the successors of the highway surveyor' who was not so liable. A highway surveyor has been held to be the successor of the original inhabitants, who escaped liability for non-feasance in repair of roads. (*Russell v. Men of Devon* (1788) 2 T. R. 667.) In order to claim this immunity a defendant must show that he really is the successor, having all the duties and liabilities of the original inhabitants. It was held that the defendant company did not occupy such a position for, clearly, if a body is authorised by statute, for its own benefit, to alter the highway upon certain conditions (such as maintenance of that piece of the highway) a new liability is thereupon created.

M. S. G.

TORT—WAIVER OF TORT—ALTERNATIVE REMEDIES IN CONTRACT AND TORT
—ACTION ON CONTRACT AGAINST ONE DEFENDANT DISCONTINUED—
POSSIBILITY OF FRESH ACTION IN TORT AGAINST ANOTHER DEFENDANT.

United Australia, Ltd. v. Barclays Bank. [1939] 2 K. B. 53.

THIS was an action for the conversion of a cheque for £1,900 by the defendant bank, or alternatively for their negligence. In November, 1934,

the defendants had collected, received and paid to the account of the M. F. G. Trust, Ltd. a cheque for £1,900 payable to the plaintiffs, and endorsed without any authority by the secretary of the plaintiffs. The plaintiffs had already brought an action in contract against the M. F. G. Co. for money lent, or alternatively for money had and received. They had also put in a proof upon the liquidation of the company. But the action had never come to final judgment, while the proof was never admitted. In this earlier action, the plaintiffs had not denied their secretary's authority. Now they were seeking to do so. Goddard J. held himself bound to follow the decision in *Verschures Creameries, Ltd. v. Hull and Netherlands Steamship Co.* [1921] 2 K. B. 608, and held that by their earlier action for money had and received and by the proof which they subsequently put in the plaintiffs had waived their right to bring the present action in tort. He accordingly gave judgment for the defendants. The Court of Appeal affirmed this judgment.

Upon the facts of the case, and since the defendants were not relying upon the Bills of Exchange Act, 1882, there was a simple case of conversion. But it was well-settled law that the plaintiffs might, if they liked, treat the facts as giving rise to an action for money had and received. This they had done in their action against M. F. G. Co., and this involved a presumption of tortious acquisition and also waiver of tort. The present defendants were correct in answering that the plaintiffs, by their previous action and the proof in liquidation, had elected to waive the tort. The sole question in debate was whether the mere election to waive the tort was enough to prevent the plaintiffs reviving their action in tort against the defendants.

In the case by which the learned judge below had held himself bound (the *Verschures Creameries Case*) the plaintiffs had actually recovered judgment, but there was evidence to show that for many years the issue of a writ had been regarded as an effective election: Bovill C.J. in *Smith v. Baker* (1873) L. R. 8 C. P. 350, 355. Cases were cited as being to the contrary, but the Court failed to find any cause in them for doubting the correctness of this view.

The evidence afforded by *dicta* as to the effectiveness of the election manifested by the issue of a writ seems fairly conclusive. See *Smith v. Hodson* (1791) 4 T. R. 211 and Bovill C.J. in *Smith v. Baker* (1873) L. R. 8 C. P. 350, 355.

There is some difficulty in the objection that there is no reason why the previous action against the M. F. G. Co. should enure to the benefit of the defendants in the present action, since they were not parties to it, and had not altered their position in consequence of the acts of the plaintiffs. This objection, however, is offset by the more important consideration that a man must not 'blow hot and cold' as the plaintiffs were seeking to do.

D. J. H. K.

BOOK REVIEWS.

Legal Essays and Addresses. By the Right Hon. Lord WRIGHT OF DURLEY. 1939. Cambridge University Press. xxxv and 442 pp. (15s. net.)

No serious student of the common law can afford to neglect this collection of essays on legal topics by a writer in whom unusual intellectual distinction is happily combined with a wide experience of the practical aspects of the law both as a very successful advocate and a judge of the highest rank. A great American lawyer once said of legal essays that they suffer 'beyond the common lot' from the 'repressive cruelty of prejudice'. This prejudice is based on a variety of considerations, some of which are not ill-founded, though others are little else but the outward sign of a type of obscurantist mentality which views any form of independent legal thought with suspicion and distrust. Many legal essays are, no doubt, purely ephemeral in character and not worth the trouble of preservation, but it cannot be denied that in the vast wilderness of printed matter represented by legal periodicals and pamphlets there lies concealed a wealth of valuable material which is too often inaccessible even to those who have at their command the contents of a well-stocked law library. To rescue this material from oblivion as has been done, for instance, in the 'Selected Readings on the Law of Contracts' is to render a real service to the legal public and on this ground alone the appearance of this volume needs no justification. But there are other grounds on which its publication may be welcomed. It brings a breeze of fresh air into the somewhat musty atmosphere of English legal literature. Legal thought in this country has been unduly hampered by an attachment to tradition, which has its value in preserving the stability of our system, though it has also contributed to the laying up in bond of certain doctrines of ancient vintage but doubtful quality. There are many lawyers—at present possibly a minority—who will find themselves in agreement with Lord Wright's view, as expressed in his address at the Harvard Tercentenary, that the future of the common law lies 'in a truer humanity and a more conscious adherence to practical exigencies'. They will also give whole-hearted support to his desire to 'abolish technicalities and rules which have no claim to exist except on grounds of antiquity'.

Lord Wright modestly describes his work as a mixed bag. This is true to some extent and candour calls for the criticism that there are a few of the essays which might, perhaps, have been omitted since they are out of harmony with the central ideas which have inspired the essays as a whole and are not of the same quality as the rest. This, however, is not in itself a matter of any moment or one which detracts in any way from the merits of a notable contribution to the study of the common law. The essays and addresses which are collected in this volume relate in the main to the law of contracts and of quasi-contracts or, as

Lord Wright prefers to term it, the law of restitution. The discussion of *Sinclair v. Brougham*, which has appeared in the pages of this journal, is placed in the forefront together with an appreciation of the American Restatement of the Law of Restitution which was published in the *Harvard Law Review*. These two essays, together with one which bears the title 'Ought the Doctrine of Consideration to be abolished from the common law?' may be regarded as the most important section of the volume under review, though the address given by Lord Wright at the Harvard Tercentenary celebrations on the 'Common Law in its old Home' should be read in connexion with them if it is desired to gain a comprehensive knowledge of the author's attitude towards certain tendencies in the development of the law at the present day. The review of *Williston on Contracts* which is included in the volume contains some very pertinent and valuable observations on 'Mistake' as an effective element in preventing the formation of a contract. Attention may also be directed to the four lectures delivered by Lord Wright in the Harvard Law School in September, 1938, which deal respectively with 'Public Policy', the *Liesbosch Case*, the *North-Western Utilities Case*, and Gold Clauses. The last-mentioned of these lectures is of particular interest as it foreshadows the extremely important exposition of the theory of the proper law of the Contract in Private International Law which was given by Lord Wright recently in *Vita Products v. Unus Shipping Co.* [1939] A. C. 277, and places the theory on a much firmer basis than that on which it has rested in the past. If we do not refer to the other essays which appear in this collection this is due to the exigencies of space and not to any disrespect for their contents.

Readers of these essays will probably concentrate their attention on those which deal with 'Consideration' and with 'Unjustified Enrichment'. This is not the occasion or place for a return to the controversy on these topics, but if the doctrine of consideration was not one which in practice is kept in subjection by the ingenuity of the judges in evading it it is difficult to see how it could survive the penetrating and devastating criticism to which it has been exposed by Lord Wright. This is also true of the fourth section of the Statute of Frauds. How long these features of the common law will continue to exist is a matter which a future generation must decide. The rules relating to unjustified enrichment are still in the making and it may well be that English legal opinion will have to become more accustomed to the break with tradition which these rules involve in the form in which Lord Wright and Professor Winfield envisage them, before this question enters a final stage. In the meantime it should not be allowed to slumber since the present state of the law is one of uncertainty coupled with the possibility of considerable hardship in many cases. No lawyer, whatever his views on these matters may be, can, however, fail to be impressed by the sincerity and robustness of Lord Wright's arguments. Law teachers, as well as practitioners, are to be found arrayed in different camps in the controversy and perhaps one of them may venture in all humility to express his hope and belief that the campaign which has been inaugurated by the learned author of these essays will come to a successful conclusion in the not distant future.

Parliament. By W. IVOR JENNINGS, M.A., LL.D., Reader in English Law in the University of London; of Gray's Inn, Barrister-at-Law. Cambridge: The University Press. 1939. xiii and 584 pp. (25s. net.)

DR. JENNINGS'S *Cabinet Government* (1936), a study of the interior mechanism of the British Cabinet system, has now been supplemented by his *Parliament* (1939). These two works, each of which must be read as part of a series, form important contributions towards the ultimate completion of Dr. Jennings's design of surveying the political institutions of Britain at the present day: other writings, notably one dealing with the party system, are to appear in due course.

Dr. Jennings's fundamental purpose is similar to the one which has been uppermost in the minds of several earlier writers, namely, to describe and analyse the working of the central institutions of British government. This was the aim of Bagehot, Traill, Courtney, Ilbert, and Lowell. As Dr. Lowell remarked, in the preface to his *Government of England*, 'England has one of the most interesting of popular governments, because it has had a free development, little hampered by rigid constitutional devices. It is an organism constantly adapting itself to its environment, and hence in full harmony with national conditions.' 'The forces to be studied', he added, 'do not lie upon the surface, and some of them are not described in any document or found in any treatise.' The time had arrived for a fresh examination of this organism of British central government in a salient epoch of its development from the view-point of its actual working in practice; and it is fortunate for students of the Constitution that this labour is being performed by a scholar who is not only the master of his materials, but also a shrewd and intelligent observer of political life.

Dr. Jennings's approach is not that of the constitutional historian; nor is his aim merely that of the constitutional lawyer who sets down in ordered form the law and custom of the Constitution. In Dr. Jennings's two works there is the combination of law, custom, and politics. The tendency of law, as John Morley observed in his *Politics and History*, is 'to stereotype thought by forcing it into fixed categories, but political science, rightly handled, is for ever reopening these categories, to examine how they answer to contemporary facts'. Although Dr. Jennings's treatises are based on law and custom, they are at the same time studies in the science of politics as applied to Britain's Cabinet and Parliament. His works will not displace those of Anson, Dicey, and other great constitutional lawyers; but they supplement the treatises of these scholars by showing us how the rules and principles of the law and custom of the Constitution actually function in the practical working of our central political institutions.

Dr. Jennings's *Parliament* is a valuable exposition not only of the rules and practices of the two Houses in the performance of their constitutional functions, but also of the main characteristics which give life to the parliamentary system. The book is in fact a scholarly analytical study of the machinery of parliamentary institutions in action. The principal stress is upon the working of the House of Commons, only one chapter being devoted specifically to the House of Lords. Of special interest are the chapters concerning the honourable members, parties and officials, the framework of oratory, the art of management, the technique

of opposition, the process of legislation, financial control, private members, private bill legislation, delegated legislation, and parliamentary democracy. The solution of the difficult problem as to who makes the laws forms the subject-matter of still another illuminating chapter. The six appendices, including one on a 'guillotine' motion, are all instructive. The index of matters is adequate.

H. D. H.

Cases on Equitable Remedies. Chaps. I—V: Interpleader, Bills of Peace, Bills *Quia Timet* for the Cancellation and Surrender of Contracts, Removal of Cloud upon Title, Declaratory Judgments. 1938. Chap. VI (published separately as pamphlet): Reformation and Rescission for Mistake. 1939. By ZECHARIAH CHAFEE, Jr., Landell Professor of Law in Harvard University. Langdell Hall. Cambridge, Massachusetts: Published by the Editor. xx and v and 707 pp.

EQUITY in American law schools, as Professor Chafee reminds us, has been suffering the fate of a process of pedagogical disintegration. One part after another has been split off from 'the old far-flung domain' of Equity and given a separate existence. Thus: Trusts, Mortgages, and Partnerships are now separate courses; Receiverships and Equitable Execution have been merged into Corporations and Creditors' Rights; and teachers of Contracts and Torts are already 'casting eager eyes' towards Specific Performance and Injunctions. Of all the doctrines and remedies developed in Chancery there are certain ones, however, which are still taught in courses on Equity in the law schools of America; and it is this residuum of the old domain of Chancery's Equity which over a period of many years Professor Chafee has not only taught orally at the Harvard Law School, but also expounded textually by means of the case-books which he has edited either alone or in collaboration with colleagues. Parts of this more restricted field of Equity have been covered by Chafee and Simpson's *Cases on Equity: Jurisdiction and Specific Performance* (two vols., 1934), Chafee's *Cases on Equitable Relief against Torts* (1924), and Pound and Chafee's *Cases on Equitable Relief against Defamation and Injuries to Personality* (1930). What he has described as 'a rather loose group of remedies dealing with multiple parties and the warding off of anticipated future disputes' have now been made the subject-matter of Professor Chafee's latest book—*Cases on Equitable Remedies*.

Designed to replace the second volume of Ames's *Cases in Equity Jurisdiction* (1904), which is out of print, Professor Chafee's present collection of cases and other authorities now includes, by the addition of Chapter VI, Reformation and Rescission for Mistake, a subject which filled two-thirds of Ames's volume. Although in the preface to the main part of his book Professor Chafee had advanced reasons for omitting Mistake and relegating it to a case-book on Restitution or Quasi-Contract, there can be no doubt that he has been wise in yielding to the strong arguments for its inclusion in his own book. It is to be hoped that he

may find the time to add a seventh chapter on Reformation and Rescission for Fraud.

The same fine qualities that have marked Professor Chafee's earlier case-books reappear in his *Cases on Equitable Remedies*: profound and accurate scholarship, sureness of tread in historical and analytical approach, and exceptional skill in the selection and arrangement of the materials offered to the student. Included among the principal cases, some of which are English, are a considerable number of those which had been chosen by Ames; and in the footnotes many of the comments of this great master of Equity have also been reproduced. For the most part, however, the book is Professor Chafee's very own. His learned and illuminating notes on special topics, interspersed among the principal cases throughout the book, are a pleasure to read: they contain extracts from judicial opinions, statutes, rules of Court, and works and articles on Equity, as well as problem-cases. Not only in these leading notes, but also in the footnotes Professor Chafee has, moreover, placed his own extensive knowledge of Equity at our free disposal in several different ways. In the problem-cases, which are based on actual cases, the Court's decision has been given more often than in Professor Chafee's other case-books: this is an advantage from the educational point of view, for knowledge of the Court's decision gives a more definite basis for discussion in class. One may perhaps venture to suggest that the learned editor's experiment of replacing both a table of cases and an index of topics by an analytical table of contents, even though that be excellent in itself, is not really a satisfactory solution of a difficult problem. The frontispiece goes far, however, to console the reader for the absence of two of the usual guides to the contents of a case-book. This is the reproduction of a portrait which shows us a smiling Earl of Eldon, one of the principal creators of modern Equity, who, standing with glass raised high above his head, exclaims, in the spirit of the victory of Equity over the Law, 'One Cheer more!'

Teachers and students of Equity in England and in America alike will welcome the appearance of Professor Chafee's *Cases on Equitable Remedies*, the latest addition to his series of case-books covering the field of 'Equity' as now taught in American law schools. The common historical foundations of Equity in England and in the States of the American Union constitute one of the most significant inner characteristics of the entire group of case-books upon which Professor Chafee has spent such infinite pains and rich learning. From their study of this notable series, now essentially complete, English lawyers will not only gain valuable information in regard to the nature of Chancery's Equity as adapted to the social and legal environment of America, but also derive the inspiration for a more intensive examination of English equity cases in their native judicial setting during the several periods of equitable development before and after the Judicature Acts, 1873 and 1875.

H. D. H.

The Law of Trusts. By AUSTIN WAKEMAN SCOTT, Dane Professor of Law in Harvard University, and Reporter on Trusts for the American Law Institute. Boston: Little, Brown & Co. 1939. Four volumes: xlv and 2981 pp. (\$35.)

PROFESSOR SCOTT's eminence as an equity lawyer has long been recognized by the profession not only in England and the United States of America, but also in those parts of the British Commonwealth where the legal system rests historically on the foundation of English law and equity. The law of trusts has always been that part of equity to which Professor Scott has devoted his main attention. In 1919 he published his well-known *Select Cases and other Authorities on the Law of Trusts*, a collection based partly on materials which had been assembled by his Harvard teacher, James Barr Ames; and over a period of many years he has also contributed to legal periodicals learned articles on aspects of the law of trusts.

It occasioned no surprise, therefore, when several years ago Professor Scott was appointed Reporter on Trusts for the American Law Institute. The Restatement of Trusts was finally submitted to the Institute in 1935 as the result of the labours of the Reporter and his Advisers. The subject of constructive trusts, which was omitted from the Restatement of Trusts, formed a part of the Institute's Restatement of Restitution; and for that part Professor Scott was also the Reporter. The Restatement of Trusts did not contain a citation and discussion of the decisions upon which the rules of the Restatement were based; and for the purpose of making available to the profession a knowledge of this case-law Professor Scott designed and wrote the treatise which he has now published under the title *The Law of Trusts*. Although it is true that constructive trusts form part of the law of restitution, and that they were so regarded by the American Law Institute, in common practice, however, such trusts have always been treated as belonging to the law of trusts in the broadest meaning of that term; and it is satisfactory to find, therefore, that Professor Scott has included constructive trusts in his work.

In the introductory parts of his first volume Professor Scott deals with the trust as a juridical institution from the view-points of historical development and present-day theory. After explaining the nature of a trust, he distinguishes the trust from other relationships which more or less closely resemble it, such as executorship, guardianship, agency, mortgage, equitable charge, and contracts to convey land and for the benefit of a third party. The main parts of the first volume are concerned with the creation of a trust, the trust property, the trustee, the beneficiary, and the transfer of the interest of the beneficiary. In the second and third volumes Professor Scott presents the law in regard to the administration of the trust, deals with the liabilities to and of third persons, and gives the rules respecting the termination and modification of the trust. Included in the third volume is a special chapter devoted to charitable trusts; and, although the entire work is concerned chiefly with express trusts, the third volume contains also important chapters on resulting and constructive trusts. The fourth volume consists of a table of cases and an excellent index of the subject-matters covered by the work.

Professor Scott's treatise is a scholarly survey of the rules and principles applicable to the main subject-matters of the law of trusts as administered by the Courts in England and the States of the American

Union. While it is impossible in this brief notice to consider in detail any one of the many topics which fall within the compass of the work, attention may be drawn to a few matters of special interest. These matters are the following:—the nature of the beneficiary's interest; the liability of the trustee, the beneficiary, and third persons; powers of appointment, of sale, to lease, to modify, and to revoke; testamentary, discretionary, and spendthrift trusts; the transfer of trust property; specific enforcement, reparation, and restitution; quasi-contract in its relation to trusts; and unjust enrichment. In respect of these and many other topics Professor Scott has rested his treatment upon English and American decided cases; and he has also considered, *inter alia*, the English statutory law concerned with trusts, such as the Statute of Uses, the Statute of Frauds, the Statute of Wills, and the Trustee Act, 1925. In many parts of the work English authorities serve as the foundation upon which the superstructure of American case-law in regard to trusts has been erected.

Professor Scott's masterpiece, written in a style conspicuous for its lucidity and force, has issued from a profound knowledge of the law of trusts in England and America; and in his work, which now takes its place on a plane of equality with Lewin's famous text-book and the other classics of our Anglo-American literature on trusts, the reasons which lie back of rules and principles have been presented with consummate skill. The legal profession in England and America is to be congratulated on its possession of an exposition of one of the fundamental parts of equity jurisprudence which both in its mastery of authority and in its illumination of doctrine will be of permanent value as a source of enlightenment. To teachers of the law of trusts, in England as well as in America, Professor Scott's treatise, the result of so much learned research and reflection, will also be of the greatest usefulness as a reliable guide to the intricacies and subtleties of the trust-concept as elaborated by the Courts of the two countries during a long period of time.

H. D. H.

Strahan's Digest of Equity. Sixth edition. By R. A. EASTWOOD. London: Butterworth & Co. (Publishers), Ltd. 1939. xxxi and 642 pp. (22s. 6d. net.)

PROFESSOR EASTWOOD has improved on previous editions by transferring references from the text to footnotes, and, as is perhaps inevitable, a certain number of slips have been made. *Re Engelbach's Estate*, and *Fowkes v. Pascoe* are misspelt at p. 234, and one is startled to find that a case reported in Peere Williams is dated 1878 (p. 30). At p. 9 the somewhat unusual spelling 'premunire' is taken over from the fifth edition. Some fifteen articles, mostly dealing with Married Women and Administration of Estates, have been omitted and three new ones inserted. The commentaries on some of the articles could do with even more revision than they have received; no student would be prejudiced, for example, if the account of general and special occupancy was omitted from p. 547. References to *Broughton v. Snook* and *White v. Bijou Mansions* are missing from the sections on Part Performance and Notice respectively, and the explanation of restrictive covenants needs re-writing. No mention is made in it of the problem which arises most frequently to-day, namely, who is entitled to enforce a restrictive covenant, a matter which

has been ably discussed by Mr. S. J. Bailey in a recent article in this Journal. Moreover, it is misleading to adopt Strahan's terminology and refer to these covenants as 'equitable easements' when that phrase is used with an entirely different connotation in the Land Charges Act, and positively incorrect to say that 'on a sale in fee simple the common law regards all covenants between vendor and purchaser as to the land sold or the land retained by the vendor as merely personal covenants' (p. 492). It is true that they do not bind the assigns of either party, as the text goes on to state, but they may be enforced by an assignee of the covenantee in certain circumstances. In his introduction, Professor Eastwood gives as his reason for re-editing *Strahan* the lack of an introductory book on Equity. This ignores Professor Keeton's work and also the second edition of *Maitland*, but for those who like their law in the form of articles and commentaries thereon, *Strahan* does provide an alternative.

D. W. L.

Liability for Animals. By GLANVILLE L. WILLIAMS. Cambridge: The University Press. 1939. lxvi and 409 pp. (25s. net.)

AFTER the enthusiastic welcome which has been given to this book by such eminent critics as Sir William Holdsworth (55 L. Q. R. 583) and Dr. Cecil Wright (17 Can. B. Rev. 613), the present reviewer is inclined to adopt the rôle of a junior member of the Court of Appeal who contents himself with concurring in the judgments of his elders and confessing his inability to add anything useful. But respect for the author precludes this course, and something must be said even at the cost of repetition. It is a most impressive work. The first thing one meets, the Bibliography, immediately conveys some idea of the extent and depth of the author's research, while one is filled with admiration at the accurate way in which the modern law is summarized into a hundred rules. The main body of the book lives up to the high promise of the opening part, and one of the most noticeable features is the great use made of the reports and legislation of common law jurisdictions outside this country. The author's views are stated so clearly and forcefully that one is reminded of Sir George Jessel's remark about his own judgments: 'I may be wrong, but I never have any doubts.' As Dr. Wright says, 'Any investigation regarding liability for animals, and kindred topics, must now begin with *Williams*. In view of the author's exhaustive treatment it is almost possible to say that it may end there as well.'

D. W. L.

Keith's Constitutional Law, being the Seventh Edition of *Ridges' Constitutional Law*. By Professor A. BERRIEDALE KEITH. London: Stevens & Sons, Ltd. 1939. lxvi and 726 pp. (25s. net.)

It is only two years since the last edition of this book was published, and no changes of any major importance have been made except that it

has increased both in size and price, and that it has changed its name. (The author's name is misspelt; it ought to be 'Ridges'.) The merits and defects, therefore, are roughly those of previous editions. On the one hand, it contains a mass of useful information which it is difficult to find elsewhere. On the other hand, its arrangement is faulty in that it devotes far too much space to the history of our judicial institutions, it deals with local government under the rubric of the British Empire, and fails to give due prominence to the important subject of Administrative Law. Furthermore, there is strict adherence to what Dr. C. T. Carr has so happily called 'the Mansfield Park standard' in the citation of statutes, for neither in the index nor in the footnotes are we told the actual year, as opposed to the regnal year, in which Acts of Parliament were passed. These defects have been inherited by Professor Keith from Mr. Ridges, but there is one for which he must bear personal responsibility. He seems to be unable on too many occasions to keep his political views out of the discussion of what are purely constitutional matters. While it is legitimate to criticize Mr. Ramsay MacDonald for his handling of the Campbell prosecution in 1924, it is irrelevant to point out that in 1935 he accepted a University seat though previously he had opposed University representation (p. 150). Further examples can be found in his remarks in the preface on the Military Training Act, 1939, on the lenient treatment of conscientious objectors and the exclusion of Northern Ireland from the operation of the statute (pp. x and xi). His other recent writings show the same trend (see *British Cabinet System*, p. 218, for a criticism of Mr. Chamberlain's foreign policy), which has been pointed out and condemned by Mr. Justice Evatt in *The King and His Dominion Governors* (p. 170). However justified such criticisms may be when political issues are under discussion in the letter column of the *Scotsman* or in the pages of contemporary reviews, they are clearly out of place in a leading text-book on Constitutional Law.

D. W. L.

Pollock's Law of Torts. Fourteenth edition. By PHILIP LANDON, M.A., M.C., of the Inner Temple, Barrister-at-Law, Fellow and Tutor of Trinity College, Oxford. London. Stevens & Sons, Ltd. 1939. xlvii and 504 pp. (25s. net.)

In the space available it is obviously impossible to attempt a real review of a work of this importance. Those teachers who recognize the need for developing the law student's power of critical analysis will be especially pleased that Sir Frederick Pollock's book should be edited by one who is well known as a prominent opponent of some of the cherished doctrines of the Pollock school. Here in one volume is a convenient forum in which both sides can be heard, for, keeping Pollock's text as far as possible unaltered, the editor has stated his own views in an excursus in the case of a major topic; General Principles, the *ratio decidendi* in *Stanley v. Powell*, Conspiracy and Negligence are treated in this way, while minor points are dealt with in footnotes. Mr. Landon's reputation for scholarship, vigour and clarity of expression is fully maintained in this most interesting edition, and it will be read by all who study this branch of law.

J. W. C. T.

Annual Survey of English Law, 1938. London: Published for the London School of Economics and Political Science by Sweet & Maxwell, Ltd. 1939. xxxvi and 434 pp. (10s. 6d.)

It is impossible to exaggerate the usefulness of the *Annual*, and this volume maintains the high standard of its predecessors. In the general preface, it is stated that the two outstanding enactments of 1938 were the Coal Act and the Inheritance (Family Provision) Act, and these are discussed under five headings. The Leasehold Property (Repairs) Act, the Rent Act, and the Trade Marks Act are dealt with under Property and Conveyancing, and the Hire-Purchase Act under Contract and Tort and Mercantile Law. There is an interesting crop of cases dealt with under Conflict of Law and International Law, which 'reflect the disturbed state of the world'. Mercantile Law takes fifty pages, Administrative Law and Tort occupy forty-seven, Evidence, Industrial Law, Conflict, Family Law, and Contract about thirty each. Constitutional Law and Industrial Law cover about twenty pages respectively. We have sampled various headings and failed to observe any omission. Great labour has been involved in preparing the *Survey*, and we owe a debt of gratitude to the members of the School responsible for its production.

T. E. L.

Broom's Legal Maxims. Tenth edition. By R. H. KERSLEY, M.A., LL.M. (Cantab). London: Sweet & Maxwell, Ltd. 1939. lxxxvii and 706 pp. (£1 12s. 6d. net.)

THE value of *Broom* has been greatly enhanced by the excellent editing of Mr. Kersley. True, that in the arrangement of subject-matter he has followed the example of previous editors, save for the transfer of four maxims to more appropriate headings, but as the previous edition was in 1924, one has but to think of the Property Legislation and the deluge of subsequent legislation and judicial decision, in order to appreciate the task of the editor. Add to this the fact that *Broom* deals with Constitutional Law, Property—its acquisition, enjoyment and transfer—Marriage and Descent, Interpretation of Deeds, the Law of Contract and the Law of Evidence, and it will be realised that the labour and skill involved in editing, in fact re-writing many sections, is equal to that of producing a sound and solid new book. Sixty-two new statutes are incorporated, and made recognisable for the first time in *Broom* by adding their short title and date to the regnal year and chapter, and eight hundred new cases are noted. The index has been vastly improved, over sixty main titles are added, and the sub-titles are enlarged and recorded in proper alphabetical order. We welcome new references to articles in the *Law Quarterly Review*, the *Cambridge Law Journal*, and the *Bell Yard*, pp. 208, 184, 119, 144, 379, 158. The law has been brought up to date, witness the numerous citations from all reports for 1939, and the editorial work has been extremely well done.

T. E. L.

Theobald on the Law of Wills. Ninth edition. By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law; sometime Eldon Law Scholar; Fellow of Magdalen College, Oxford; All Souls Lecturer in Private International Law. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1939. lxxxii and 842 pp. (£2 2s. net.)

THE learned editor has performed with conspicuous success the difficult task of excising old or obsolete matter in the text, including some 3,000 of the older cases, and incorporating new material—some fourteen statutes and 350 decisions given since 1927. Five chapters which appeared in the previous edition have been rightly omitted, a dozen chapters have been entirely re-written; many have been re-arranged, every chapter has been carefully revised, and the style of *Theobald* remains unimpaired. A new Chapter XIV has been added on the Inheritance (Family Provision) Act, 1938. The result is an accurate and up-to-date book for the practitioner and the teacher, which is shorter by some 266 pages than the previous edition. Among recent decisions we note: p. 3, *Re Cartwright* [1939] Ch. 90 (meaning of personal estate); p. 53, *Goldie v. Adams* [1938] P. 85 (revival); p. 269, *Re Lewis* [1937] 1 All E. R. 556 (gifts to children); p. 507, *Berry v. Green* [1938] A. C. 575 (accumulations); p. 649, *Re Vaux* [1938] Ch. 581 (ademption); p. 697, *Re Turner*, *ibid.* 593 (A. E. A. s. 35). A slip occurs at p. 24 in connexion with section 9, Wills Act—the will must be signed ‘in his presence or by his direction’. ‘Or’ should be ‘and’. We note at p. 361 the reference to S. J. Bailey’s article in *Cambridge Law Journal*, Vol. VI, p. 67, on section 130 (2), L. P. A. 1925. A reference might have been made to *Re Marsland* [1938] 4 All E. R. (covenant not to revoke) at pp. 62 and 521, and to *Re Spracklan* [1938] 2 All E. R. 345 (C. A.) (revocation) at p. 45. *Re Wolson* [1939] Ch. 780 was reported too late for inclusion.

T. E. L.

Equity through the Cases. By JOSEPH ARNOLD NATHAN, B.A., B.C.L., Barrister-at-Law. London: Stevens & Sons, Ltd. 1939. lv and 458 pp. (16s. net.)

THIS is a new book of outstanding merit, and no good student will ‘come to Equity’ save ‘through the Cases’. It is a judicious selection of about 115 leading cases and of the most informative judgments in all of them, to which are added explanatory, expansive and very instructive notes, containing abundant references to relevant cases, and to articles in current legal periodicals, English and foreign. The gist of the leading cases is clearly and skilfully stated in a headnote, the facts are set out, and long extracts from the judgments, carefully pruned, give all that one could desire. The book is divided into three parts, (i) an introduction of twenty pages on the nature of an equitable interest, (ii) a complete account of trusts covering 337 pages, and (iii) various spheres of equity—clogging the equity of redemption, restrictive covenants affecting land and chattels, and contracts for the benefit of a third party. There is a useful appendix of the relevant statutory provisions. Numerous contro-

versal points are well discussed in the notes, pp. 82, 84, 116, 165, 248, and 236. We would have liked some discussion of section 60 (3), L. P. A. 1925. A slip occurs at p. 44, para. (b) (i) and (ii), for in neither case must the contract *be in writing*, but only *evidenced in writing*. Mr. Nathan has produced a first-class book, and all who seek Equity must seek it 'through the Cases'.

T. E. L.

Snell's Principles of Equity. Twenty-second edition. By H. GIBSON RIVINGTON, M.A. (Oxon). London: Sweet & Maxwell, Ltd. 1939. clvii and 677 pp. (30s.)

An Epitome of Snell's Equity. Second edition. By H. GIBSON RIVINGTON, M.A. (Oxon). London: Sweet & Maxwell, Ltd. 1939. xii and 272 pp. (9s.)

Snell has been thoroughly revised and brought up to date. About 150 cases have been added in the footnotes and text; many old or obsolete cases and paragraphs have been omitted, and nineteen new statutes are incorporated. Entirely new paragraphs appear at pp. 11–12 (on Order V, Rule 5A; the Chancery Courts of Lancaster and Durham, and the county court's equitable jurisdiction); pp. 50–2 (a very clear summary of the rules relating to priority); p. 251 (survival of claims against deceased's estate); pp. 252–3 (the rule in *Ex p. James*); p. 374 (the Leasehold Property (Repairs) Act, 1938). The following portions have been entirely rewritten: pp. 77–80 (secret trusts, in the light of *Re Keen* (1937)); pp. 124–5 (voluntary conveyances of property); pp. 308–9 (postponement of the right to redeem as explained in *Knightsbridge Estates Trusts, Ltd. v. Byrne* (1938)); Chapter XXV (in view of the Law Reform (Married Women and Tortfeasors) Act, 1935); pp. 584–90 (restrictive covenants as interpreted in a crop of recent cases). Perhaps a reference might have been made to *Re Spencer Wells* [1933] Ch. 29, on the nature of the equity of redemption.

Both *Snell* and the *Epitome* maintain that admirable standard of accuracy which we associate with the name '*Rivington*'.

T. E. L.

The Residence and Domicil of Corporations. By A. FARNSWORTH, Ph.D., LL.M. (Lond.). London: Butterworth & Co. (Publishers), Ltd. 1939. xxxvii and 370 pp. (21s.)

THE author's conclusions can be summed up thus: Firstly, the test of residence is one of statutory law. It envisages the place where the central control and management is actually situate. A corporation can be resident in several countries. The test of residence is applied in tax law; it serves to ascertain jurisdiction, commercial domicil and the *situs*

of debts (could it be possible to have a conflict of *situs*?). Secondly, domicile is a term of the common law; a corporation has one domicile only, namely, where it is incorporated. This place determines also its nationality. It is to be regretted that the author did not venture one step farther. Firstly, the test of residence is not one of Private International Law. It does not serve to decide a conflict between two systems of law; it demarcates the application of English law and may even lead to a conflict of laws (double taxation). Secondly, since domicile is identical with the place of incorporation, the test of domicile seems superfluous and should be superseded by that of the place of incorporation. The author rejects control as the test for determining nationality, but he disregards the classical statements of the Mixed Arbitral Tribunals 1, 422; 3, 892. The chapter on the Private International Law proper of corporations is perhaps the least satisfactory part of the book and many questions remain to be solved (see Lloyd, *The Law relating to Unincorporated Associations*, pp. 179—205). Mr. Farnsworth must be congratulated for having thrown new light upon a difficult problem. He has written a thought-provoking book, containing a wealth of material.

K. L.

The Law of Carriage by Inland Transport (founded on *Disney's Law of Carriage by Railway*). First edition. By OTTO KAHN-FREUND, LL.M., Dr.Jur. London: Stevens & Sons, Ltd. xxiii and 424 pp. (12s. 6d. net.)

DR. KAHN-FREUND has attempted the difficult task of reducing the maze of legislation affecting carriage by railway and by road into the compass of a small volume. To a very large degree he has succeeded, though at the cost of omitting much that appeared in *Disney*, including the law relating to canals. But road traffic is now such a specialized subject that we doubt whether Dr. Kahn-Freund has been wise to compress a small section of its law into a single chapter while devoting the rest of the book entirely to railway law. The history of railway rates, which is now of topical interest, is admirably set out in Chapter XIII, and the railway section of the book is up to date, though we doubt whether the decision in *Clarke v. West Ham Corporation* [1909] 2 K. B. 858 has been so universally accepted as good law as Dr. Kahn-Freund appears to think.

From the practitioner's point of view, several criticisms are offered in the hope that the defects will be remedied in later editions. The table of cases gives no references either to the reports cited in the footnotes or to secondary reports in which the cases cited appear. This is a serious omission when so many cases are reported only in the specialized reports. Further, the omission of a table of statutes and of statutory rules is a glaring defect in a work dealing with a subject largely governed by legislation. It is said to be in the interest of conciseness that it is omitted. It would be better in that interest to omit sixteen pages of publishers' advertisements and to include the table which would occupy less than half that space.

PATRICK DEAN.

Arnould on Marine Insurance. Twelfth edition. By R. I. SIMEY and G. R. MITCHISON. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1939. Two volumes: xcix and 1936 pp. (£5.)

THE fifteen years which have elapsed since the publication of the last edition of this standard work on Marine Insurance have not produced many decisions of importance except perhaps in connexion with that most difficult of all branches of insurance law, freight insurance. The decisions of the Court of Appeal in *Carras v. London & Scottish Assurance Corporation* [1936] 1 K. B. 291 and *Kulukundis v. Norwich Union* [1937] 1 K. B. 1 may be said to have thrown some light upon the much disputed question of when there is total loss of freight, by treating freight insurance as akin to insurance on goods rather than insurance on hull. Both these cases are discussed at length in the new edition, which has been brought fully up to date by the inclusion of such cases as *Marstrand Fishing Co. v. Beer*, 56 Ll. L. Rep. 163 (loss by barratry). The decision in *Robertson v. Petros M. Nomikos* [1939] A. C. 371 was unfortunately given by the House of Lords too late for inclusion in this edition, which has been prepared by its editors with great skill and care and fully lives up to the reputation earned by the earlier editions.

PATRICK DEAN.

The Construction of Deeds and Statutes. By SIR CHARLES E. ODGERS, M.A., B.C.L., of the Middle Temple, Barrister-at-Law, late Puisne Judge of the High Court of Judicature at Madras. London: Sweet & Maxwell, Ltd. 1939. xxxii, 310 and (index) 19 pp. (15s. net.)

THIS is a book which students will find very useful. The author disclaims originality, but his work of condensation and selection from the larger books on the subject has been well carried out. There are a few obvious misprints ('Co. Litt. 112-6' for 'Co. Litt. 112 b' (p. 51); *Blasson v. Blasson* was decided in 1864, not 1884 (p. 155)) and some infelicities ('It may be doubted whether the House of Lords has not gone very far in this case, though they purported to found on the genuineness of the transaction' (p. 309)), but really there is very little to criticize. The statement of *Elliot v. Joicey* on p. 155 might be amended so as to make it clear that it was there held that a child *en ventre sa mère* could be treated as born only if it was for its *direct* benefit. The value of the book to students would be increased if the names of all the cases except the most important were placed in the footnotes instead of in the text; at present equal prominence is given to leading cases and to many which obviously do not fall into that category. Further, a judicious use of heavy type instead of using italics for headings and sub-headings alike would make the arrangement of some sections (e.g., Part II, sect. 5) considerably clearer. But these are comparatively small matters; the author is to be congratulated on a sound and well-written book.

R. E. M.

Evidence before International Tribunals. By DURWARD V. SANDIFER, M.A., LL.B., Ph.D., Assistant to the Legal Adviser of the Department of State. Chicago: The Foundation Press, Inc. 1939. xii and 433 pp. (\$10.00)

THERE is, properly speaking, no international law of evidence, for each tribunal is a law unto itself governed by the terms of the *compromis*. However, the *compromis* often says little or nothing about evidence and the arbitrators are left to improvise, or to draw on previous arbitral practice or private law analogies. In this way there has grown up a mass of precedents which show a surprising degree of uniformity. This book appears to be the first systematic treatise on that very important body of practice. The author has had first-hand experience of the working of international tribunals and, indeed, it was the difficulty he then experienced in ascertaining international practice in the matter of evidence that persuaded him to undertake this study. The result is a very useful practitioners' guide to the sources: it should also be consulted by anyone interested in the contributions made by common and civil law doctrines to international law. There is an appendix of documents and a bibliography.

R. Y. J.

Workmen's Compensation. Vol. I. By Sir ARNOLD WILSON, M.P., and Professor HERMANN LEVY. Oxford University Press. 1939. xxi and 328 pp. (10s.)

THIS volume deals with the social and political development of workmen's compensation. It is a short history of the relevant parts of the common law and a detailed history of the Employers' Liability Act and the Workmen's Compensation Acts. The questions asked are essentially: Why was legislation needed? What form did it take and what concepts lie behind that form? What have been the results? Certain points stand out clearly. The judges failed to adapt the common law rules to modern needs. The policy of Parliament allowed insurers to build up vested interests, and these interests now stand in the way of reform. The workman's employer need not be insured. The insurance is costly and, as a public service, monstrous; in 1920 only 48 per cent. of premiums was available for claims, the rest being absorbed by expenses and profits. The expenses and profits have been reduced to 40 per cent., which compares unfavourably with American experience of State management that leaves over 90 per cent. of premiums free to meet claims. The present system keeps accident-prevention and compensation as two separate topics instead of uniting them. The authors have obviously produced this book at great speed; what is lost in form may be gained in utility, for the Royal Commission on Workmen's Compensation is still sitting and there is yet time for enlightened opinion to have some effect. It is to be hoped that the second volume, on the need for reform, will appear as soon as possible.

R. M. J.

The British Year Book of International Law, 1939. Twentieth year of issue. Oxford University Press; Humphrey Milford. vi and 249 pp. (16s.)

THE Year Book has long been so well known and its reputation is so high that even if conditions were normal it would not be necessary to do more than give an indication of its contents. It is enough to say that the twentieth number maintains the standard of its predecessors. Mr. Jenks gives a careful review of the extent to which the English Courts have recognized the authority of decisions of the Permanent Court of International Justice. A critical account of the methods so far employed to bring about the unification of private law is given by Professor Gutteridge. Mr. Fachiri discusses the repudiation of the Optional Clause. Dr. Glanville Williams and Mr. R. Y. Jennings supply interesting articles, the former on the Juridical Basis of Hot Pursuit and the latter on the Refugee Question. There is also an article on British Rights in the French Zone of Morocco. There are, as usual, sections devoted to Notes, and the most important decisions of International and National Tribunals which have been given since the issue of 1938.

J. W. C. T.

Cases on Private International Law. By J. H. C. MORRIS, B.C.L., M.A. Oxford: Clarendon Press. 1939. xxiv and 405 pp. (30s. net.)

THIS volume to a large extent satisfies a widely felt need for a compendium of cases on Private International Law. It is intended to serve as a companion volume to Dr. Cheshire's text-book and, as most students commence, and not infrequently end, their study of the subject with that excellent work, it will do much to lighten their task. It follows the arrangement of Dr. Cheshire's work in the main and will thus furnish easy reference in reading. The occasional notes are most useful, concise and to the point. It is to be regretted that Mr. Morris has not included cases on *Renvoi* as it is a subject which is constantly debated, and although we incline to Dr. Cheshire's view on the matter, it is desirable that students should be able to become familiar with the treatment of the question in the English Courts, even though it is open at present to review.

D. T. O.

The Law relating to Trusts and Trustees. Ninth edition. By the late Sir ARTHUR UNDERHILL, LL.D., assisted by EDWARD BAGSHAW, M.A., Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1939. cxli and 684 pp. (42s. net.)

PART of the preparation of this long-awaited edition was done by Sir Arthur Underhill himself, until the illness that ended his life compelled

him to entrust the completion of it to his assistant, Mr. Edward Bagshawe. It may be this division of the work that makes the editing rather conservative. The most noticeable addition is a mass of references to the publishers' *English and Empire Digest*. This may be useful for the country practitioner, but for the serious worker it leaves a twinge of regret that a fraction of this space was not turned to other uses. For one thing, there are virtually no references to periodical literature. Thus the treatment of trusts for non-charitable associations (p. 68) is scanty, and makes no mention of Mr. Hart's exhaustive discussion in (1937) 53 L. Q. R. 24. No account is taken (pp. 67-8, 85-6) of the growing conviction among modern writers that the rules against remoteness of vesting, perpetual duration and inalienability are not the same, and at p. 85 *Re Chardon* (twice misspelt) is discussed without notice of Mr. Albery's important contribution in (1938) 54 L. Q. R. 258. Hardly any attempt is made to incorporate the recent cases on secret trusts (p. 91 n. (r)): *Blackwell v. Blackwell* is simply a case that 'follows' *Re Fleetwood*; and *Re Keen's Estate* [1937] Ch. 236 is simply a case that 'distinguishes' *Blackwell v. Blackwell*; no reference is made to Sir William Holdsworth's critical study of *Re Keen* in (1937) 53 L. Q. R. 501. Minor criticisms of this sort might be multiplied, but if they are advanced at all it is only because the original text is so good that we would not willingly see the standard of editorship depart from the high level that it sets. In its present edition *Underhill* is still the best concise exposition of the English law of trusts.

G. L. W.

Contracts for the Benefit of Third Persons. By A. M. FINLAY, Ph.D., LL.M. London: Sweet & Maxwell, Ltd. 1939. xi and 150 pp. (10s. 6d.)

THIS monograph fills a literary gap in our law of contract. Its author has developed his theme on the lines which should be adopted in writing of any subject which is at once obscure and important. He has dealt with it in the past, in the present and in the future. The past especially needed investigation, for, like many another tangled skein in English law, history here explains how we have reached the present unsatisfactory position, and if the Courts had been more fully acquainted with it, it may be that one or two decisions which Dr. Finlay finds unconvincing would have been rendered differently. He traces the two threads of 'agency' and 'trust' running through the law, and rightly says (p. 50) that recent cases have not carried the trust conception much farther. One contributory cause of this, in our opinion, is the mechanical way in which the leading treatises on the law of trusts are edited after the death of those who have written them. In three of these treatises the problems raised by the *Dunlop Case* [1915] A. C. 847, and *Walford's Case* [1919] A. C. 801, do not appear to exist for the editors, so that the Equity practitioner who relies upon such books is not even put upon his inquiry with respect to these questions.

At p. 144 '*uberrima fidei*' needs correction, and 'Sumner J.' should be 'Hamilton J.'.

P. H. W.

Law in the Making. Third edition. By C. K. ALLEN, M.C., M.A., D.C.L. Oxford: Clarendon Press. 1939. xxxii and 542 pp. (21s.)

THIS work, from the time of its first publication, has been recognized as an important contribution to English Jurisprudence. The new edition contains additional matter extending to nearly 150 pages and the text throughout has been carefully revised and in some parts has received modification. In his Introduction Dr. Allen has added a critical survey of the views of leading Continental and American writers on legal theory which students will find stimulating although not easy to follow unless read with the closest attention. The revised chapters on Precedent, especially with reference to the growth of case-law in England, will be read with considerable interest. Two Excursus have been added, one on Custom as Law dealing with certain criticisms of his views as to the legal efficacy of custom, and a second on Statutory Interpretation, in which certain defects in English methods of interpretation are discussed.

D. T. O.

An Introduction to the Rent Acts. By R. E. MEGARRY. London: Law Notes Lending Library, Ltd. 1939. xiv and 69 pp., with Supplement of 11 pp. (Cloth 5s. 6d.; Paper 4s. 6d.)

WE would like to congratulate Mr. Megarry on the clear way in which he has set out the main principles of the mass of legislation contained in the various Rent Restriction Acts. It was most unfortunate that yet another Act should find its way on to the Statute Book within two months of the appearance of his work, but he has explained its provisions and its effect on the previous law in the supplement. This book and the supplement together form the best and most up-to-date introduction to the subject and will be welcomed not only by students but also by those lawyers who have to grapple with Rent Restriction problems in the course of Poor Man's Lawyer work.

D. W. L.

The Principles of the Law of Bankruptcy and Deeds of Arrangement. Second edition. By HAROLD POTTER, Professor of English Law in the University of London, TERENCE ADAMS, Solicitor of the Supreme Court, and AUGUSTUS W. DICKSON, Solicitor of the Supreme Court. London: Butterworth & Co. (Publishers), Ltd. 1939. lii and 355 and (index) 35 pp. (12s. 6d. net.)

THE re-arrangement and the considerable changes in format of this edition are a great improvement; rules and exceptions now catch the eye, and the study of the book will be much easier. The entire work has been completely overhauled and a new Chapter XIV on Enforcement of Bankruptcy Laws and Bankruptcy Offences has been added. We

welcome the retention of so many extracts from judgments. Many cases decided before the previous edition have been added, and new ones are noted down to the end of 1938. Among others we note *Re Andrew* [1937] Ch. 122 (s. 40 (1), B. A. 1914), *Re Seymour*, *ibid.* 668 (protected transactions), and *Re Debtors* [1936] Ch. 622 (deed of assignment executed abroad). At p. 78 *Re a Debtor* [1938] 4 All E. R. 92 (C. A.) might have been referred to on service of bankruptcy petition. The learned editors have produced a valuable text-book which will meet the needs of all students faced with an examination on the principles of bankruptcy.

Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice. Twelfth edition. By W. BLAKE ODGERS, K.C., M.A., of Balliol College, Oxford, the Middle Temple and the Western Circuit, Recorder of Southampton, and B. A. HARWOOD, B.A., of Christ Church, Oxford, the Inner Temple and the Western Circuit. London: Stevens & Sons, Ltd. 1939. lxiv and 567 pp. (20s. net.)

ODGERS has been the guiding light of the young practitioner and of the law student in the mysteries of civil procedure since 1891, and this twelfth edition will prove as instructive and as popular as its predecessors. The general arrangement remains the same. All the recent changes in procedure have been incorporated, notably those consequent upon the Law Reform Acts, 1934, 1935, Administration of Justice Acts, 1934, 1938, and the County Courts Act, 1934. The text has been thoroughly revised, several of the older cases have been replaced by more recent ones, and we note that a paragraph has been devoted to the 'Poor Person'. The index is now much more comprehensive.

Elements of Insurance Law. By M. P. PICARD, LL.B., Bacon Scholar of Gray's Inn, Barrister-at-Law. Second edition. London: Sweet & Maxwell, Ltd. 1939. xii and 188 pp. (9s.)

THIS is an admirable student's text-book. It is clear, concise and up to date. In this edition the effect of some eleven additional statutes and forty new cases has been incorporated, notably *Morley v. Moore* [1936] 2 K. B. 359 (effect of 'knock for knock' agreements between insurance companies), and *Izzard v. Universal Insurance Co.* [1937] A. C. 773. Omissions in the previous edition have now been made good, e.g., pp. 83-5 (suicide clause), pp. 124-5 (section 11, Married Women's Property Act, 1882), p. 133 (*Ayrey v. British Legal, etc., Assurance Co.* [1918] 1 K. B. 136). The appendices of forms and summaries of cases have been enlarged.

Elements of English Law. By the late W. M. GELDART, Vinerian Professor of English Law at Oxford. Third revised edition by Sir WILLIAM HOLDSWORTH, K.C., D.C.L., Vinerian Professor of English Law at Oxford. London: Home University Library; Thornton, Butterworth, Ltd. 256 pp. (2s. 6d.)

THIS valuable little classic is too well established to call for any detailed review. Suffice it to say that the learned editor has incorporated all the principal changes and additions to the law which have been made since 1929.

Introduction to the Study of the Law of the Constitution. By A. V. DICEY, K.C. Ninth edition. By E. C. S. WADE, M.A., LL.D. London: Macmillan & Co., Ltd. 1939. clvi and 681 pp. (15s.)

DR. WADE has wisely refrained from any attempt to modify the text of this classic treatise as it was finally settled by the author himself in the seventh edition, issued in 1908, and left unaltered by him in 1914, and has confined himself to adding footnotes where it is necessary to call attention to new developments in the law. In a new and valuable introduction he reviews in succession the three great constitutional principles which Professor Dicey maintains to be the distinguishing features of our Constitution and, in a series of Appendices, has added a very full discussion of the nature of Administrative Law as developed in England (with an account of *Droit Administratif* in France contributed by Professor René David of Grenoble) and very useful surveys of the present state of the law as to Public Meetings and Freedom of Discussion. The new edition, which gives evidence throughout of the care and accuracy which distinguishes all Dr. Wade's work, should receive a very hearty welcome from students of the subject.

D. T. O.

The History of the English Electoral Law in the Middle Ages. By LUDWIG RIESS. Translated with additional notes by Dr. K. L. WOOD-LEGH. Cambridge University Press. 1940. 107 pp. (7s. 6d.)

THIS brief but famous essay deserved to be made accessible to English readers, not only for its substance, but also as a historical document in the story of changing views about the origin of the Commons. He was a bold man who, in 1885, could challenge accepted beliefs by suggesting that the House of Commons was the child rather of authority than of rebellion, a device for increasing the King's means of control over local government. The reaction, thus started, may have gone too far in the next generation; but the essay set the ball rolling. It was salutary also in its scepticism, refusing to speculate where printed evidence was lacking, and setting later writers to search for new evidence. It is significant

that, while the present editor has found it enough to add occasional notes to the main part of the text, she has judged it wiser to suppress altogether Riess' discussion of social changes in the fourteenth century. Social history has changed more radically than constitutional history in the last fifty years. The editor's work is neat and relevant.

C. W. C.

An A B C of Divorce Practice. By G. RENDEL BISHOP, assisted by J. W. W. SACHS. London: Sir Isaac Pitman & Sons, Ltd. 1939. xiv and 381 pp. (15s. net.)

THIS book is arranged on a novel and successful plan. The first part, which covers some 226 pages, contains a guide to divorce practice arranged under alphabetical headings. The Matrimonial Causes Rules are worked into the text, but can easily be located with the help of the very complete index. In the appendix the Matrimonial Causes Act, 1937, and the Evidence Act, 1938, are set out in full. The second part contains a collection of forms, some 120 in number, which seem to cover most of the contingencies with which the ordinary practitioner will ever be faced. We think that lawyers who have to deal with divorce problems will find this a most useful handbook to possess.

D. W. L.

Selected Speeches on the Constitution. Edited by C. S. EMDEN. Oxford University Press: Humphrey Milford. 1939. Two volumes: xv and 258 pp., and viii and 306 pp. (2s. net each.)

THE publishers of the *World's Classics* have followed up their collections of speeches and documents on Dominion and Colonial Affairs by an equally useful edition of speeches on the English Constitution. The selection has been left to the capable hands of Mr. Emden and we can confidently say that no student of Constitutional Law should be without these two volumes.

D. W. L.

A Selection of Cases and Materials on the Law of Contracts. By GEORGE K. GARDNER. Cambridge, Mass.: Harvard University Press. London: Humphrey Milford. 1939. xii and 1276 pp. (31s. 6d.)

PROFESSOR GARDNER is little known in this country, but anyone who has been at the Harvard Law School will vouch for him as an original thinker on the Law of Contract and as a brilliant, if somewhat disturbing, teacher of that subject. A casebook is not the ideal medium for giving outlet to such qualities, but English readers can get some idea of what

Professor Gardner can do by reading the introduction and studying the plan on which the book is arranged. We would like to suggest that when he comes to re-issue this casebook, he should insert a detailed analytical table of contents similar to the one which is to be found in Scott and Simpson on *Judicial Remedies*.

D. W. L.

Constitutionalism and the Changing World. By C. H. McILWAIN. Cambridge: The University Press. 1939. viii and 312 pp. (15s. net.)

In this volume is collected a number of articles which have appeared in various periodicals over a large number of years. Their merit, therefore, has already been established, and it is very helpful to have them brought together between the covers of one book. The two essays on Magna Charta and the one on the Tenure of English Judges are of most direct interest to the lawyer, but the others can all be read with considerable profit, especially by anyone who is specially concerned with Constitutional Law.

D. W. L.

Willis's Workmen's Compensation. Thirty-second edition. By W. ADDINGTON WILLIS, C.B.E., LL.B., assisted by GEOFFREY BARRATT, Barristers-at-Law. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 1939. cliii, 1128 and (index) 100 pp. (£1 net.)

THE leading work on Workmen's Compensation has been brought up to date in a manner appropriate to its position. Those advising workmen will regret to see that since this edition went to press the decision of the Court of Appeal in *Selwood v. Townley Coal and Fireclay Co., Ltd.* [1939] 4 All E. R. 34 (see pp. 524, 527) has left the door open to grave abuses, despite the limitations illustrated by *Stimpson v. Standard Telephones and Cables, Ltd.* [1939] 4 All E. R. 225 and *Unsworth v. Elder Dempster Lines, Ltd.* (1940) 56 T. L. R. 319.

R. E. M.

Public International Law (Questions and Answers). By R. G. C. DAVISON, LL.B. London: Sweet & Maxwell, Ltd. 1939. vi and 92 pp. (5s. net.)

THIS supplies a useful compendium of the questions usually met with in examinations on the subject and will be of considerable help to students as a revision book. The answers are well composed and should be of great assistance in enabling students to frame their own.

Principles of English Law and the Constitution. By O. HOOD PHILLIPS. Sweet & Maxwell, Ltd. 1939. xvi and 610 pp. (21s. net.)

It is a pleasure to recommend this book, not only to students, but also to their elders. To students it will be an excellent text-book, covering a range of subjects that one had often hoped would some time be covered by two books; and giving a knowledge that is more than elementary. In fact, one wonders how Mr. Hood Phillips got so much information into the space, while managing to keep up the interest, and point the way to further and deeper study. For others than students, the book will provide many interests. It is a good example of easy expression in simple and understandable English. It is condensation of material without losing the sense of narrative or dropping into disconnected statements. Best of all, the book is a remarkable example of describing what has been found to exist without any expression of personal opinions. A rumour of the Comptroller having held up the Army's activities for a day during the last war can be recorded without a reference to red tape. With knowledge and care the Dominions and Colonies are discussed, but without exhibiting a superiority complex. The twenty-seven pages on Ireland provide a general description of developments there since the last war, and the conclusion about the position of the Free State is accurate and made without comment.

The book covers a very wide field; it comes near to condensing a small library. The Introduction covers theories of Jurisprudence, International Law, and Constitutional Law. Part I deals with the English Legal System; the chapter on The Main Branches of English Law is a good introduction to the study of Substantive Law; but, having done so much, we should have liked here two sections on Evidence and Procedure; they are scantily treated in Chapter XIII along with The Judicature. Part II is on The Constitution of the United Kingdom; well tabulated, and very informative. Part III deals with The Constitution of the British Empire, and, as we suggested above, does it exceedingly well. The Table of Statutes is good; the Index of Cases is of the best possible, for it gives the dates and references; and the General Index is a credit to its maker. The book is well printed and easily read in more ways than one. Errors are few and minor. The publishers could safely offer to return his money to any purchaser who thought his guinea ill-spent.

H. B.

Negligence in Delict. By J. C. MACINTOSH, B.A., LL.B., and C. NORMAN SCOBLE, B.A., LL.B. Second edition. Cape-town and Johannesburg: Juta & Co., Ltd. 1938. xxi and 383 pp.

THIS book is doubly welcome to readers of this Journal, first, because Mr. Macintosh is an old Cambridge man whose association with the Journal goes back to its birth, and, secondly, because this study of negligence is a mine of information on the differences between South

African and English law. The main lines of both systems are alike in this topic, but there are important differences. It is odd for an English lawyer to find a dog classified by his South African brother as inherently vicious, and to note that it has taken the Courts there some time to realize that there is such an animal as a 'normal bull, which is not ordinarily ferocious'. Common employment, that galling pack upon the back of our law, does not burden the law of South Africa; and, there, the general doctrine of negligence is regarded as broad enough to make any special rule like that in *Rylands v. Fletcher* unnecessary. The statement (at p. 164) that '*Rylands v. Fletcher* is now regarded as a decision on nuisance' is over-confident. So is the idea, developed at p. 69, that *Re Polemis* finally established 'directness' as the sole test of causation in tort. 'For South Africa', says Mr. Macintosh, 'the question is still open'. So it is in English law, as those of us who have tried to state the rules of remoteness of consequence know to our cost.

These are but examples of the value of the book for comparative purposes. We shall use it often.

P. H. W.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831—1860. Vol. XI. Spain. Selected and arranged by WILLIAM R. MANNING. Washington, Carnegie Endowment for International Peace. 1939. (\$5.)

THIS volume lends emphasis to the view expressed in the preceding issue of this journal that the series of *Diplomatic Correspondence* edited by Dr. Manning is a most useful contribution to the documentary history of International Law. The present volume is almost wholly devoted to the affairs of Cuba and is on this account of particular interest to the history of the law relating to hostile expeditions against foreign States, to privateering and, to some extent, to piracy. It also throws light on the efforts made to abolish traffic in slaves. The student interested in the question of recognition of States and Governments will find some instructive information in the present volume. This is so although the subject is not mentioned in the index. It is of obvious importance in a bulky compilation of this kind that the index should not be based almost exclusively on names of persons and countries, but that it should provide a full guide to topics likely to be of interest to the lawyer.

H. L.

Research in International Law. I.—Judicial Assistance. II.—Rights and Duties of Neutral States in Naval and Aerial War. III.—Rights and Duties of States in Case of Aggression. 1939. Concord, N. H.: Rumford Press. iv and 961 pp. (\$5.)

EXIGENCIES of space make it impossible to do more than put readers upon their inquiry as to this very valuable piece of investigation conducted under the auspices of the Harvard Law School Faculty. It represents the fourth phase of a series of productions, the first of which appeared in 1929.

They are cast in the form of draft conventions, which are, of course, unofficial and which, if they merely stood by themselves, would have no higher value than that attaching to a projected code recommended by any distinguished international lawyer. But the 'Comment' and Appendices on the subject-matter of the drafts supply a wealth of information for which every teacher and student of International Law will be grateful.

Other books and publications received (some of these will be reviewed in the next issue):—

The Bell Yard. Journal of the Law Society's School of Law. Solicitors' Law Stationery Society, Ltd. (2s.) No. 22, May 1939. 'Void Contracts', by A. M. FINDLAY, Ph.D., LL.M.; 'The Invitee. Is there a Conflict?', by ROBERT SEGAR, M.A.

The Factories Act, 1937. Second edition. By H. SAMUELS, M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law. London: Stevens & Sons, Ltd. 1939. xxi and 702 pp. (30s.)

Bytes on Bills. Twelfth edition. By A. W. BAKER WELFORD, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1939. lxxix and 456 pp. (42s.)

Heywood and Massey's Lunacy Practice. Sixth edition. By DONALD G. HUNT and JOHN F. PHILLIPS, LL.B. (LOND.), both of the Management and Administration Department (formerly the Office of the Masters in Lunacy). London: Stevens & Sons, Ltd. 1939. xlvii and 687 pp. (40s.)

The Conveyancers' Year Book, 1940. By Sir LANCELOT H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law. One of the editors of the twenty-third edition of 'Prideaux's Conveyancing Precedents'. Vol. I. London: The Solicitors' Law Stationery Society, Ltd. 1940. xl and 325+xli-lxxiv pp. (10s. 6d.)

The Law of Maritime Liens. By GRIFFITH PRICE, M.A., of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1940. xxiii and 264 pp. (25s.)

Sarkar's Law of Evidence in India and Burma. Sixth edition. By S. C. SARKAR, Judge, Calcutta Small Cause Court, Sometime Special Officer, High Court, for revision of Civil Rules and Orders. Calcutta: Sarkar & Sons, Ltd. 1939. 141 and 1411 pp. (16s.)

Handbook of Admiralty Law in the United States. By GUSTAVUS H. ROBINSON, Professor of Law, Cornell School of Law. Hornbrook Series. St. Paul, Minn.: West Publishing Co. 1939. xiii and 1025 pp.

Brooke's Treatise on the Office and Practice of a Notary in England, with a Collection of Precedents. Ninth edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1939. xv and 464 pp. (30s.)

Res Nullius. An Essay on Property. By I. S. PAWATE, M.A., LL.B. Published by I. S. Pawate, at his residence in Harapanahalli Oni, Hubli. 1938. 207 pp.

Law as Fact. By KARL OLIVECRONA, Professor of Law in the University of Lund (Sweden). Copenhagen: Ernar Munksgaard; London: Oxford University Press. 220 pp. (D. Cr. 8.50.) (7s. 6d.)

The Dilemma of Penal Reform. By Dr. HERMAN MANNHEIM, Lecturer in Criminology at the London School of Economics and Political Science. With a Preface by Professor A. M. CARR-SAUNDERS. London: George Allen & Unwin, Ltd. 238 pp. (7s. 6d.)

Tulane Law Review. Vol. XII, Nos. 3 and 4. 1939. New Orleans: The Tulane University of Louisiana. (\$4.00.) Among leading articles of interest to us are: 'Function of the Comparative Method of Legal History and Philosophy', by ARTHUR H. KUHN; 'Vices of Consent in the Law of Contracts', by HERBERT A. HOLSTEIN; 'Documentary Conditions of Payment in Commercial Letters of Credit', by WOOD BROWN; 'Interpretation of Contracts in Modern European Law', by ROBERT R. KÜHLEWEIN.

Contributo Allo Studio Della Formazione Giudiziale del Diritto. 'Case Law' E 'Stare Decisis'. By GIAN ANTONIO MICHELI, R. Università di Pavia. 1938—XVI. 92 pp., reprinted from Vol. 23. Studi delle Scienze Giuridiche e Sociali.

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It is regretted that the exigencies of the war have reduced the space available for book reviews and made it necessary to give no more than short notices of many of the works reviewed.

THE KING'S PREROGATIVE.*

THE RIGHT HON. THE VISCOUNT CALDECOTE.

I MAY, I hope not inappropriately, begin by recalling a story told by our Chairman's distinguished predecessor, Sir William Anson, about Mr. Gladstone. While he was out of office, in 1890 Mr. Gladstone accepted an invitation to visit All Souls. The invitation included a request that he would give some kind of an address to the members of the Union Society, which had been the scene of his triumphs as an undergraduate sixty years ago. He agreed to do so and in a discussion with his host, the Warden of All Souls, as to a choice of subject Mr. Gladstone said that the subject did not very much matter provided it was one of *general* interest. He was thereupon persuaded to choose his own topic, and in due course he gave an eloquent address to a large undergraduate audience on 'The Connexion of Homer with recent Assyriological Discovery'.

I cannot hope to rival the authority of the lecturer on that occasion. The interest of the subject I have chosen, however, is at least as great. The Royal Prerogative, moreover, may be thought a fitting matter for a newly fledged Lord Chief Justice to discourse upon when it is remembered how large a part some of those who in a manner of speaking may be called his predecessors played in the controversies that have raged round this topic. It was Sir John Finch, Lord Chief Justice of the Common Pleas, who in *Hampden's Case*¹ declared baldly that Acts of Parliament to take away the King's royal power in the defence of his kingdom are void: 'they are void Acts of Parliament', he said, 'to bind the King not to command the subjects, their persons and goods, and I say their money too: for no Acts of Parliament make any difference.' A more famous Lord Chief Justice of the Common Pleas and of the King's Bench than Finch, the great Coke, also had a hand on the same side. Notwithstanding his earlier opinion that the King's subjects were not to be moved for

* An inaugural lecture delivered to Westfield College, London University, at St. Peter's Hall, Oxford, on November 30, 1940.

¹ (1637) 3 St. Tr., at col. 1235.

benevolences by the King by his Great Seal, he lent his authority in the case of St. John to the opposite contention and, as Bacon reported in a letter to James I, delivered the law for the benevolence strongly. This seems strange perhaps from a man whose views, as Sir W. Holdsworth says, as to the supremacy of the law have become a dogma of our modern law of the Constitution.² And here I may introduce a word of caution as to the way in which we should approach these great and entrancing discussions both in Parliament and in the Courts concerning the royal power. Hallam would have us believe that the judges were 'tampered with'³ or that they were 'corrupt with hope of promotion, many more fearful of removal, or awe-struck by the frowns of power'.⁴ That was true enough of some, but speaking for myself I find it impossible to read the opinions of the judges, for instance in *Hampden's Case* (The Case of Shipmoney)⁵, where there was a bare majority for the exaction of the tax, or in *Darnel's Case*⁶ on the subject of commitments to prison without trial, without feeling that according to their lights most of the judges attempted in the face of great temptation and some danger to lay down correct law. They often strayed from what we now believe to be the straight high road of the Common Law of England, but no student of their arguments will ever understand them if he starts off with the belief that all who were in favour of the absolute or sovereign power of the King were knaves or cowards. It most certainly is not the case. On the other hand there were some whose names will never stand very high for the independence which we now expect in the judges, and one such is Jeffreys. An incident in his career—he was a careerist if ever a man was one—marks the high-water point reached by the Royalist theories after the Interregnum. Sir George Jeffreys—Judge Jeffreys as we have all learned to call him in memory of the Bloody Assize, notwithstanding the fact that he was both Lord Chief Justice and Lord Chancellor—was admitted a Serjeant-at-Law. Those of you who are acquainted with the history of the Order of the Coif will not need to be reminded that it was the practice for newly admitted Serjeants to present not only to their colleagues and to the Lord Chancellor but to the King himself rings bearing some motto. Jeffreys, no doubt hoping for favourable notice from James,

² Hist. of Eng. Law, VI, 84.

³ Hist. of England, I, 343.

⁴ *Ibid.* 318.

⁵ (1637) 11 St. Tr. 825.

⁶ (1627) 3 St. Tr. 1.

inscribed on his rings the words 'A Deo rex: a rege lex', not only a concise but also a challenging statement of the then fashionable opinion. I refrain from recalling other pronouncements on the same side by Chief Justices of one or other of the King's Courts, but I may mention one whose authority ought to have been decisive in saving the Crown lawyers of the Stuart Kings from presenting arguments which to-day sound fantastic. I refer to Chief Justice Fortescue, who in the words of the Master of Trinity was the 'typical common lawyer of the fifteenth century',⁷ and his famous treatise on the English constitution *De Laudibus Legum Angliae*. He stated with remarkable clarity and as one born out of due time the limitations on the King's power which even in Henry VI's days he saw as the safeguards of an Englishman's liberty. 'The King of England', he said, 'cannot alter nor change the laws of England at his pleasure.' That is good sound stuff and one may wonder how, in the face of it, it came about that Proclamations, Dispensations and Monopolies were ever conceived. In a later passage he compared the King and subjects of England to the head and body natural. It is true that Lord Chief Justice Finch, two centuries later, poured cold water on Fortescue. His book 'was writ', said Finch,⁸ 'when the civil wars were between the two houses of York and Lancaster, and he himself was in exile; no time then to displease the people'. But Fortescue had the laugh in the end. The emergence of the doctrine of the reposal of sovereign power in the King, or, as Fortescue would have said more tersely, the doctrine of 'the Prince's pleasure', was not even in Fortescue's time a new development. Coke,⁹ speaking in the debate on the Petition of Right, admitted (what must always be remembered and is nothing to fear or to regret) that prerogative is part of the law, but, he added, 'sovereign power' is no Parliamentary word. In his opinion it weakened Magna Carta and all the statutes, and then he uttered one of the famous sayings of these moving debates: 'Take heed what we yield unto: Magna Carta is such a fellow that he will have no "sovereign".' On the other hand, Attorney-General Bankes thought that John's Magna Carta had never been confirmed, because, he said, it trenched too much upon the prerogative of the King and Crown. So the controversy was at least as old as King John and the fact that from time to time through the centuries the fires died down

⁷ G. M. Trevelyan, *Hist. of Eng.* 255.

⁸ 3 St. Tr., at col. 1230—1231, where the passages from Fortescue are cited.

⁹ Rushworth, *Historical Collections*, &c., I, 562.

was perhaps due rather to the personality of the reigning Sovereign than to the acceptance of a particular view. Anson in his famous book begins as far back as the Saxon Kings. John Allen, a learned writer of the early nineteenth century on the Prerogative—not a lawyer but holding political opinions which were to be expected from an ardent admirer of Charles James Fox—traced the theory of the ideal King back to the barbarians who conquered the Roman Empire and adopted its titles and trappings. ‘Men’, Allen says, ‘accustomed to hear their Prince described as the source and depository of their laws began to think there must have been some ground for the assertion.’¹⁰ By the time Blackstone had written churchmen and lawyers between them had produced an effulgent creature to be King. Indeed Blackstone’s King was more than creature: he was absolute ruler, supreme judge, sole owner of land, Commander of the Forces, immortal, infallible, ubiquitous and incapable either of doing or even thinking wrong. No wonder they had to find a special niche for him in their legal system, so they called him a corporation sole. If it seemed difficult to believe that a being which in Allen’s words was ‘finite, corporeal and mortal’ could possess such attributes as they ascribed to the King, no such doubts could be felt about a ‘corporation sole’. Maitland has made delightful fun of this legal phenomenon.¹¹ Coke, he says, knew two corporations sole that were not ecclesiastical and only two. ‘They were a strange pair: the king and the chamberlain of the city of London.’ After declaring that the ecclesiastical corporation sole is no ‘juristic person’: ‘he or it is either natural man or juristic abortion’, Maitland concludes by saying: ‘The worst of his or its doing we have not yet considered. He or it

¹⁰ No study of the Prerogative could be complete without acquaintance with this book on this subject. Allen was a strange creature. When he was over thirty he met Lord Holland for the rest of whose life the two lived together. Allen himself was one of group of persons so delighted at the fall of the Bastille that they celebrated the event with a dinner in Edinburgh. ‘Bliss was it in that day to be alive.’ He was brought up as a doctor, but his real interests lay in other directions. His treatise (or, rather, pamphlet) is the work of a genius. Maitland (Collected Papers, III, 248) thought that the mistake of this memorable work consisted in the suggestion that even in very old days the Folk could be and was clearly conceived of as a ‘person’, a single ‘subject’ of ownership and other rights. Allen had said that among the ancient Germans the territory possessed by the tribe was considered as the property of the community: it was folcland, whereas land that had been severed from it by an act of government might belong to the King or the Church or a subject. But when the King was thought of as the representative of the State, the folcland or public land came to be called and considered his. Hence the origin of the Crown lands, the disposal of which to the King’s favourites was a gross abuse. Maitland coupled Allen with Selden and Stubbs as a good roadmaker.

¹¹ Collected Papers, III, 210, 218.

has persuaded us to think clumsy thoughts or to speak clumsy words about King and Commonwealth.' ¹²

The inconvenience, to put it no higher, of these clumsy thoughts may be illustrated by a reference to the theory of the demise of the Crown. As we have all been taught, the King never dies, but it seems that if the King does not die at any rate the Crown does, or used to do something very much like it. Blackstone, summarizing an observation made by Plowden, says: 'When we say the demise of the Crown, we mean only that in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor.' ¹³ That may sound all very well nowadays and no doubt it did in the eighteenth century, but I can imagine some one in the times of the late Saxon and Norman Kings asking for the body politic to be produced in order to see what it looked like when it had lost its companion the natural body. The Saxon Kings were not hereditary but elected, as every one knows, by the Witan: it might be a younger son who was preferred to the elder, or a brother to a son: even an illegitimate son to the son born in wedlock. No doubt the Conqueror submitted himself for election, however much a formality, in order that he might conform to the English custom, but at any rate William Rufus, Henry and Stephen were in turn the choice of electors who were frankly partisan. Henry II enjoyed the advantage of a treaty made with his predecessor by which he became heir to the throne, and, to secure his son, Henry II tried to avoid the perils of an election by having him crowned in his own lifetime by the Archbishop of York—just as David is recorded in the First Book of Kings to have done for his son by Bathsheba in order to forestall the claims of Adonijah. In course of time the claims of the heir to the throne became established as of right, but for a long time the beginning of a reign was not what we call the accession, but the coronation, or in some cases the recognition of the succeeding King. In the time of Sir Edward Coke the theory of the demise of the Crown was treated chiefly as a matter of practical convenience. Coke in his Report of *Calvin's Case* concerning the rights of persons born in Scotland after James VI of Scotland became King of England says: 'The King *in genere* dieth not; but, no question, *in individuo* he dieth: as for example, Henry VIII, Edward VI etc. [I like the "etc."'] and Queen Elizabeth died, otherwise you should

¹² *Ibid.* 243.

¹³ 1 Comm. 249.

have many Kings at once' ¹⁴—as inconvenient as having two Kings in Brentford. It did not, however, always tend to convenience, as may be seen from the consequences of the opinion of the judges given after the Restoration that Charles II had been King both *de facto* and *de iure*, with the uncomfortable result for some of his most loyal subjects that they had committed treason in recognizing, while he was absent, other powers. ¹⁵

All this of course is well trodden ground, and is to be found in Blackstone and in Allen's book on the Prerogative to which I have referred, in Howell's voluminous Reports of State Trials, and, I need scarcely say, in Holdsworth's *History of English Law*. That the debate reached its tragic close only with the death of Charles I and the flight of James II was due perhaps to the personalities of Henry VIII and Queen Elizabeth. When Elizabeth was Prince—and, as Maitland aptly says, 'more often Prince than Princess', ¹⁶—her understanding and good sense enabled her to do without objection or even without notice things which, done by a Stuart King, would have provoked a riot. Sir W. Holdsworth observes that Elizabeth possessed in an eminent degree the Tudor power of attracting and using the ablest man of the day, a power which was denied to the Stuarts. ¹⁷ No doubt her servants may be said to be the forerunners of the long line of Parliamentary Ministers who have gradually absorbed the right to exercise powers which we still describe as the King's Prerogative. The struggle, which was at first between the Prerogative and liberty and then between the Prerogative and Parliament, affected the Royal power partly by placing restrictions upon it, but partly also by transferring responsibility to Ministers with a Parliamentary majority behind them, so that in time it became plain to all that though the King is our Sovereign Lord, the sovereign authority of the Commonwealth is vested not in the King singly but in the King, Lords and Commons jointly, and now it must be added, if truth is to be told, with the House of Commons the predominant partner in the Constitution. This development is an example both of the elasticity and of the durability of the Constitution in that ancient forms and words come to be used so naturally to frame or describe new realities. The same point may perhaps be put a little differently. The

¹⁴ (1609) 7 Rep. 1, 106.

¹⁵ Bacon, Abridgement, *tit.* Prerogative (A).

¹⁶ Collected Papers, III, 253.

¹⁷ Hist. of Eng. Law, VI, 10.

discretionary powers which were exercised by Tudor or Stuart Sovereigns are now exercised by Ministers but under a different guise. A recent case may illustrate this way of stating the changing nature of our Constitution—always different, but always the same. In the sixteenth and seventeenth centuries kings were accustomed to use a wide discretionary power of imprisoning people who were in some way obnoxious to them—‘troublers of Israel’, as one might say—but it is a mistake to think of these imprisonments as the mere exercise of arbitrary power to the undoing of political opponents. There was much more law in it than that. *Darnel’s Case*¹⁸ when Charles I was young on the throne affords an interesting study of this use of the prerogative. Five gentlemen of position who refused to pay the Forced Loan were committed to the Fleet Prison by the Privy Council. The Warden of the Prison made a return to a writ of habeas corpus that they were detained ‘per speciale mandatum Domini Regis’. The question for the Court of King’s Bench was whether this was a good return so as to preclude the judges from admitting the prisoners to bail, they having committed no offence known either to Statute or to Common Law. The Attorney-General argued that the King may commit and often shows no cause. He went on to suggest that the secrets of the commitment ought not to be opened in the return to the writ. Serjeant Bramston for the prisoners did not dispute that the Privy Council had the right to imprison but contended that the King in Council must specify the causes. Lord Chief Justice Hyde, newly placed on the Bench in the seat of Sir Randolph Crew L.C.J., who, it is recorded, showed no zeal for the Forced Loan, declared the opinion of the Court that the return was sufficient and the Court was not to examine the truth of the return but must take it as it was. It was a power the use of which was recognized by the Common Law Courts of the realm, and the judges, be it remembered, declined to disclaim responsibility for protecting the rights of persons imprisoned without trial. Sir W. Holdsworth says that a discretion which under the Tudors the Crown had assumed to imprison its subjects was without doubt in the critical times through which the nation was passing a salutary and necessary power. A generation ago I doubt whether that view would have been widely held. To-day we can understand it, for Ministers are to-day exercising a power of imprisonment which is called detention. True it is a power which is exercised

¹⁸ (1627) 3 St. Tr. 1.

under a Defence Regulation, having behind it the sanction of a statute, but the very title of Defence Regulation suggests that, though the statute operates, as it were, as an Act of Indemnity, the real justification for the arrest of these persons is the safety of the Realm. In whatever age this argument appears it is attractive and it is no wonder that, in days which were as dark and stormy as our own, both King and ministers held to it. Solicitor-General Littleton repeats the argument over and over again in his speech for the Crown in *Hampden's Case*: 'No more doth our King, but only to defend himself and the kingdom.'¹⁹ Until Home Secretaries are infallible, what Attorney-General Heath said with apparent complacency in his argument in *Darnel's Case*²⁰ is still true: 'It may be, divers men do suffer wrongfully in prison, but therefore shall all prisoners be delivered? That were a great mischief.' In other words, the supreme law is the safety of the State and far above the liberty of a few people who may be unjustly imprisoned. I must be careful not to express views this afternoon which in another place I might wish unsaid. Therefore I content myself with saying that I have seen it argued within the last few months that Regulation 18B of the Defence (General) Regulations allows a Secretary of State to detain persons and if challenged for his authority to swear an affidavit which discloses no cause except that the Home Secretary is satisfied as to various matters mentioned in the Regulation. Perhaps I may quote in this connexion a passage from Sir William Holdsworth's chapter on the political controversies of the seventeenth century, which puts the point much better than I can²¹: 'Though in some cases the breadth and elasticity of the royal prerogative have been of the greatest service to our modern executive,—the Cabinet, in this case the fear which the House of Commons had in the seventeenth century of trusting the king with a discretionary power of arrest and detention, has deprived it of a power to take precautionary measures, which, in disturbed times, might be very useful. But in spite of the fact that the executive now represents the party possessing the majority in the House of Commons, the view taken by Charles's Parliaments that the safe-guarding of individual liberty outweighs this inconvenience, is still the better view. Executives which imagine that they are backed by popular approval are at least as contemptuous of their

¹⁹ (1637) 3 St. Tr. at col. 948.

²⁰ (1627) 3 St. Tr. at col. 45.

²¹ Hist. of Eng. Law, VI, 40.

opponents, and at least as ready to adopt high-handed measures against them, as kings who imagine they are backed by a divine right.' Whether this is sound doctrine or not I give no opinion, but as a footnote to this passage I may remind you of the complaint of the House of Commons, in the address prepared for, but probably never presented to, James I, called *The Form of Apology and Satisfaction* to be presented to His Majesty²²: 'The prerogatives of princes may easily and do daily grow'. They may grow no less quickly when they are committed to Ministers backed by a party with a Parliamentary majority, and if the safety of the Realm requires them to grow, few of us, I suppose, in present circumstances are prepared to check them.

Before I pass from these discursive observations on some aspects of the struggle between the people and the prerogative, I may call attention—for it is worth our notice—to the astonishing courage and tenacity with which these controversies were fought. Some of the leading disputants were lawyers, naturally combative and assertive: others were Parliamentarians entering into the fray with all the zest that is acquired from membership of a popular assembly: but others were country gentlemen, sometimes they were quite humble folk: perhaps a country parson, or a merchant. They bore suffering and loss, and counted it well spent in establishing the cause which seemed to them right. To give one or two examples, William Stroud and Benjamin Valentine, the two least distinguished of the eight members of Parliament, were committed to imprisonment by the King for their part in the memorable compulsion of Speaker Finch on February 23, 1629, and they remained in prison for eleven years rather than find security for what was called good behaviour. The Reverend Edward Peacham, Rector of Hinton St. George, Somerset, endured the tortures of the rack rather than make admissions which went far beyond anything that could be proved against him on a charge of high treason. Rash and extreme he may have been, but he belonged to a stout breed of men to whom in a gentler age we have reason to be grateful. John Hampden was a rich man who, at the time of the Ship Money Case, was living happily and quietly in his Buckinghamshire home. He, however, knew better the issues at stake than Chief Justice Finch, who said in his opinion for the Crown that, 'Mr. Hampden . . . hath the least cause to complain, being assessed

²² Prothero, *Select Statutes*, 289.

but 20s., a contemptible sum in respect of his annual revenues'.²³

The Revolution Settlement was the harvest of the fruits of the labours of these men. The way in which the bloodless triumph came is one of the chapters of English history which every one knows. How the King as he fled threw the Great Seal into the Thames only to be fished up a little later as if by a miracle is an oft told story but it is a parable. Round the use of the Great Seal many quarrels had ranged. While they continued, it may have seemed less obvious to the men of that day than it is to us how the battle was going. When the Act of Settlement was law, no one could any longer have any doubt which side had won, whatever regrets he might feel for things that had passed. Never again was the king's Prerogative a disputable subject. The Great Seal was fished up to be used thereafter so as to excite no passions. Parliament now became the chief partner in the work of government but no longer as a rival to the Crown. Gradually, it is true, the territory of the Prerogative was eroded by the operation of Acts of Parliament, and Kings learned in a new school, at any rate until 1760. Then, as we were all taught to believe, George III with Lord Bute as his fellow conspirator attempted to model himself on Lord Bolingbroke's Patriot King, and to make the Prime Minister—as the Master of Trinity says²⁴—‘a mere instrument of the royal will, and to reduce the Cabinet to a group of the “King's servants” in fact as well as in name’. A few years ago Professor Namier, and more recently Mr. Ronald Sidgwick, have with some heat derided this traditional view of the years from 1760 to 1780. They may be right and the letters published by Mr. Sidgwick²⁵ that passed between the King and Lord Bute, together with the account he gives of the education of George while he was Prince of Wales, provide an interesting study. In any case, however, the plan, if plan there was, failed, and the steady process went on again by which the Prerogative has become the name of powers which are much diminished and now are exercised by ministers in the name of the King. You read that the King held a Council at which persons sworn of His Majesty's Privy Council were present. The Lord President of the Council or a deputy for him attends. In his hands he holds a list of a number of draft Orders in Council, drafted

²³ 3 St. Tr. at col. 1221.

²⁴ G. M. Trevelyan, *Hist. of Eng.* 547.

²⁵ Letters from George III to Lord Bute (1756—1766).

and prepared by ministers, and one by one he reads the titles. The King perfects the drafts by saying 'Approved', and enactment of Orders in Council by the exercise of the Royal Prerogative has been completed. It will not be forgotten of course that many of the Orders in Council, perhaps the majority, are made under powers created by Parliament, but others are made by virtue of what is still called the Prerogative. They may relate to the government of Crown Colonies, the Civil Services or the King's Forces and a variety of other matters, the regulation of which has not yet been made altogether the duty of Parliament; or the King's approval may be given under advice tendered to him by the Judicial Committee of the Privy Council. I apologise for saying so much that is elementary and well known, I have no doubt, to every one listening to me; it is told with perfection of skill by Anson. I must, only in passing, emphasize the undoubted right of the Courts to consider prerogative legislation and declare it to be *ultra vires*. If it is not open to objection on this ground it is as much part of the law of the land as any Act of Parliament.

Few apprehensions are aroused by the exercise of this power, changed though it is from its former character. Nothing could better illustrate the difference that the years have made than the contrast presented between the definitions of the prerogative by Blackstone and by Dicey. Blackstone says it is 'that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of the Common Law, in right of his regal dignity'.²⁶ Dicey defines it as 'the discretionary authority of the executive'.²⁷ It is conceivable that some day disputed questions will arise concerning the use of the powers, whether properly called the prerogative, or merely the powers derived by ministers from statute law. It depends upon the way in which the Parliamentary system develops. The organizations which we call Parties more and more tend to entrench Ministers or the Executive in positions from which it is very difficult to dislodge them. So far, with very great respect to my distinguished predecessor, Lord Hewart, the author of *The New Despotism*, I have not detected in Ministers of any political colour a desire to overstrain their powers to the prejudice of the subject. They sometimes ask for greater powers than they really need, and they often find themselves driven to obtain from Parliament powers to make laws in the form of what is called 'delegated legislation'. Lord Hewart performed

²⁶ 1 Comm. 239.

²⁷ Law of the Constitution (9th ed. 1939) 429.

an invaluable public service in calling attention to the defects of the system. But this has very little to do with the Prerogative properly speaking, though, without any extravagant use of language, it may be said that ministers are building up a prerogative of their own. Let me return to the genuine prerogative. The statement by Dicey of the Prerogative which I have already quoted has received in effect the approval of Lord Parmoor in the House of Lords in the case *Att.-Gen. v. De Keyser's Royal Hotel* [1920] A. C. 508, 567, about the requisition of De Keyser's Hotel in the last war. It must be a question of interpretation whether a statute impinges on and takes the place of the prerogative. It often happens that Parliament enables His Majesty to do by Orders in Council things which he may already do by exercising the discretionary authority up to that time left in him. None the less the authority will be lopped to the extent to which it is dealt with by Act of Parliament. The reason was explained by Lord Atkinson in the *De Keyser Case* [1920] A. C., at p. 539: 'It would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative to do the very thing the statutes empowered it to do.' At a time when private rights suffer, and I am entitled to say readily suffer, all sorts of invasions for the defence of the Realm, it is profoundly important that Parliament should use, and if necessary should make opportunities for keeping under steady review, the powers themselves as well as the exercise by the Executive of their powers. Formerly the Prerogative had to be watched and even restrained: to-day when the balance of power has moved from the Crown first to Parliament and then to Ministers, more not less vigilance seems to be required. I may be allowed to express a doubt whether during the last twenty-five years the tendency to allow the demands of legislation upon Parliamentary time cuckoo-like to grow has not gone too far.

I have not left myself time to say more than a very few words concerning two uses of the prerogative, which may at any time vitally affect the future of the Realm and Empire. The first of these is the power to make treaties. Subject to some qualification concerning treaties which involve a new charge upon the people there is no doubt that the Crown always had and still has the power of making treaties without Parliamentary sanction. At the same time the demand of

Parliament or particularly of the House of Commons to be informed in advance of treaty proposals is often heard: certainly no Government could resist a demand in Parliament to be consulted before any treaty of first-class importance is ratified. In a well-known case, *The Parlement Belge*,²⁸ concerning the character of a foreign ship, that is to say, whether it was a vessel of war or not, Sir Robert Phillimore described an agreement to treat mail boats as vessels of war as a case of treaty making prerogative of the Crown without precedent and in principle contrary to the law of the Constitution.²⁹ With all respect to a great judge I think this is a misconception. But it is immaterial because Parliament has its full share in responsibility for all treaties of critical importance, and in the case of all other treaties the Executive are left to advise the King, free from Parliamentary control.

The other use to which I refer is the power to transfer British territory to another Power. I have myself been asked in Parliament for an assurance that His Majesty's Government would not part with the sovereignty over any part of the dominions of the Crown without having obtained the sanction of Parliament. I was able to give the desired assurance on the occasion to which I refer in the House of Lords, but it certainly is not an essential condition that Parliament should first give its approval. It is fatally easy to deceive oneself concerning the value of a Parliamentary vote. Debates are invaluable. Opinions may be decisive, but divisions mean little or nothing, and the numbers of the majority may melt like snow at a general election. The real remedy for, and the real prevention of, public disquiet, and the real guarantee of public safety, are that ministers, like Queen Elizabeth, should watch their way with anxious and unceasing care. Then they will find their powers sufficient—neither too few nor too many—and words like 'prerogative' instead of recalling ancient quarrels will be memorials of British good sense.

I fear I have allowed myself to dilate more than a little tediously upon some topics which are not suitable for this occasion. That is the worst of getting a lawyer on to the platform. He lives in an atmosphere in which the importance of legal questions is much magnified and if he has experience of the House of Commons he is apt to think every one takes as much interest in its proceedings as he does. I plead guilty to these temptations, though I hope I may have performed some

²⁸ (1879) 4 P. D. 129.

²⁹ *Ibid.* 154.

useful purpose even while I yielded to them. The success of our legal and Parliamentary institutions cannot be secured if they are not understood and esteemed. Prerogative is one of the great words and realities of our constitution. To suppose that the changes that have been seen in 400 years have left the King stripped of authority and power is to misread the history of those years. The fact that we find in the Crown the very safeguard and corner-stone of our rights is indisputable evidence of the reality of sovereign power, wisely held in trust for a proud and free people.

P. M. HAMLIN'S *LEGAL EDUCATION IN
COLONIAL NEW YORK.*

H. A. HOLLOND.

THE commendation of Mr. Hamlin's book ¹ *Legal Education in Colonial New York* in the foreword by Emeritus Professor Beale ² should ensure for it a warm welcome by the Cambridge Law Faculty, apart from the interest which its subject merits on the part of a body of teachers.

In 1664 an English expedition under Governor Richard Nicholls captured New Amsterdam, thereafter to be called New York. During the fifty years which followed most of the lawyers in practice in the province had received their education and training in England. But those years left little achievement behind them, and indeed the decade that followed the flight of James II was one of anarchy in which the prestige of the legal profession was at a low ebb. The Supreme Court of Judicature of the Province of New York was established in 1691, but was composed of merchants and business men ³ until the arrival of John Guest. Guest, who was a graduate both of Cambridge and of Oxford, and a barrister of Lincoln's Inn of twenty-four years standing, was sent out by William Penn to be Chief Justice of Pennsylvania. For reasons not stated, he was not admitted to that office until 1701, and in the meantime he organized the judicial system of New York.

The following letter, addressed in 1698 by Governor Bellomont to the Lords of the Council for Trade, shows the state of the law at that time:—

‘My Lords, I have given your Lordships the trouble of many letters since my being in this government, but I have yet a business of greater consequence to apply to

¹ Published in 1939 by the New York University Law Quarterly Review, Washington Square East, New York. Mr. Hamlin is Director of Research in Colonial Laws and Institutions in the New York University School of Law.

² Joseph Henry Beale, Junior, some time Royall Professor of Law in the University of Harvard, for many years the leading authority on the Conflict of Laws, lectured in Cambridge in 1921 as the guest of the Law School, and received from the University the Honorary Degree of LL.D. He has done as much as any American scholar of his generation to stimulate an interest in legal history in the United States.

³ With the small exception that one Thomas Johnson, a lawyer, served as judge for one year.

your Lordships about than anything I have hitherto writ to you of; which is, the administration of justice. That which is the very soul of government, goes upon crutches in this Province, and deserves your Lordships immediate care and redresse above all things whatsoever.

‘Colonel Smith one of the Council is Chief Justice of the Province, but is no sort of Lawer [*sic*] having been bred a soldier. He is a man of sense and a more gentleman like man than any I have seen in this Province, but that does not make him a lawyer. Then he lives four score mile off, and comes but twice a year to this town at the times of the Supream Court’s Sitting, just to earn his sallary, which is a hundred pounds p^r ann: sterling; and so is of very little use or service to the government. Whereas a man in that station ought to be a lawyer and a man of great integrity and resident in this town to be always ready to assist the government. As to the men that call themselves lawyers here and practise at the Bar, they are almost under such a scandalous character, that it would grieve a man to see our noble English laws so miserably mangled and prophaned. I do not find that a man of ’em ever arrived at being an Attorney in England. So far from being Barristers, one of them was a Dancing Master, another a Glover by trade, a third which is Mr. Jamison was condemned to be hanged in Scotland for burning the Bible and blasphemy, a fourth which is Mr. Nicolls, your Lordships have had his character formerly from me, and there are two or three more as bad as the rest; besides their ignorance in the law, they are all, except one or two, violent enemies to the government, and they do a world of mischief in the country by infecting the people with ill principles toward the government.

‘Now that there is a prospect of doubling the revenue I am humbly of opinion we ought to have good judges sent from England and King’s Councel to mind the interest of the Crown. The Lawyers here do so prey on the people that it is a melancholy thing to heare how unequally justice is and has been distributed in this Province. . . . New Yorke December the 15th 1698.’

In response a number of lawyers were persuaded to cross the Atlantic. The foremost of these were Sampson Shelton Broughton, of Oxford and the Middle Temple, Attorney-General of New York from 1701 till his death in 1705; John Bridges, of Cambridge and the Inner and Middle Temples, Associate

Justice of the Supreme Court of New York, 1702, Chief Justice from 1702 till his death in 1703; and Roger Mompesson, of Oxford and Lincoln's Inn, Associate Justice of the Supreme Court from 1702 to 1704, and Chief Justice from 1704 till his death in 1715.⁴ The latter had been a member of Parliament and Recorder of Southampton.

After Mompesson's death in 1715 'the bench of the supreme court for fifteen years was filled by laymen who had read law but no one of whom had received special training or had engaged in legal practice'.⁵ We should like to be told more about the 'able and learned' Lewis Morris, Chief Justice from 1715 to 1733, whose arresting portrait appears as frontispiece.⁶ He is described in one place as merchant and planter,⁷ elsewhere he is said to have been admitted to the bar in 1696,⁸ and to have been a legal and classical scholar.⁹ In 1757, under the Chief Justiceship of James De Lancey, the Court was for the first time composed entirely of trained lawyers, and thereafter every appointee was a member of the bar of long practical experience.

The Court of Chancery was presided over by the Governor, or Lieutenant-Governor, who seldom was a lawyer.¹⁰ But as most matters coming before the Court were referred to Masters this fact was not fatal. The first Chancellor with a legal background was Governor William Burnet, 1720-7, of Cambridge and the Middle Temple.¹¹ Under his presidency the reputation of the Court reached its highest level. There was no Master of the Rolls before the appointment in 1774 of James Jauncey, Junior, who had graduated at Princeton in 1763 and had successfully established himself at the bar.

Admiralty jurisdiction was in the seventeenth century in the hands of the Governor, who delegated his authority, especially to the Mayors of New York City. But throughout the eighteenth century it was the practice, with rare exceptions, to appoint lawyers as judges of the Court of Vice-Admiralty.

⁴ There is in the library of the Law School of Columbia University a large manuscript Abridgement of the Law by Mompesson. P. 85.

⁵ P. 206.

⁶ In 1738 he became Governor of New Jersey, and held this office till his death in 1746. He was the father of Lewis Morris, Junior, (judge of the Vice-Admiralty Court), and grandfather of Gouverneur Morris, the Revolution statesman. Pp. 79, 89.

⁷ P. 206.

⁸ P. 79.

⁹ P. v.

¹⁰ Some Governors were reluctant to undertake judicial work and delayed taking the oath of chancellor unless ordered from England to hold Courts. P. 111.

¹¹ He was a son of the famous Gilbert Burnet, Bishop of Salisbury.

Summing up, Mr. Hamlin says that the judges of the more important Courts of colonial New York were men of education and experience, assisted by a numerous and well-trained bar; a fact which helps to account for the high reputation of the law of New York State.¹²

Treating of his main theme, the training of lawyers during the colonial period, Mr. Hamlin gives a list of forty-three lawyers, residing in the Province of New York during some part of the years 1664 to 1784,¹³ who were members of an Inn of Court. But he tells us that there were 'several score' of lawyers, attorneys, solicitors and others, who emigrated to New York and practised there, having previously been trained in law in England.¹⁴ He refers to an Appendix for lists of these, but among the various lists given I find none which corresponds with this description.

In the eighteenth century the Inns of Court were no longer serious educational institutions.¹⁵ Nevertheless some colonials joined them in order to gain either social advantages or experience. The American-born members of the Inns of Court before 1815 numbered about 230; Lincoln's Inn 32, Inner Temple 43, Middle Temple 146, Gray's Inn 9.¹⁶ But New Yorkers were not numerous among them: in the list of members of Inns who practised in the province during the years 1664—1784 I have counted seventeen who were born in the province.¹⁷ And it is established by Mr. Hamlin that those who joined an Inn, or even were called, did not necessarily spend any substantial time in London. James Alexander, 1687—1756, joined Gray's Inn in 1724, at the age of thirty-seven, and William Smith, 1697—1769, joined the same society in 1726, at the age of twenty-nine. Joseph Murray and John Chambers, whose birth dates are not given, joined the Middle Temple in 1725 and 1731 respectively. 'Each of these had already acquired a standing at the bar, and was in New York or New Jersey week after week, month after month, attending to his practice and his various interests at the very time it has been supposed that he was studying in London. A most careful

¹² P. 112.

¹³ The total number of lawyers who practised in the Courts of New York during this period was over four hundred. P. 115.

¹⁴ P. 31, n. 26.

¹⁵ See the passage quoted on p. 15 from Dr. Blake Odgers' article in *A Century of Law Reform*, pp. 32-3.

¹⁶ E. A. Jones, *American Members of the Inns of Court*, published 1924. Six men were members of more than one Inn.

¹⁷ In addition to the seventeen referred to, there are eleven who joined Inns giving New York as their residence, but cannot be traced as having practised in New York.

investigation covering the year preceding and the three years subsequent to his recorded admission shows that none of these young men could possibly have lived in London for any length of time, certainly not long enough to satisfy the customary regulations governing the occupancy of chambers at any one of the Inns.¹⁸ Mr. Hamlin concludes that Gray's Inn and the Middle Temple, at any rate, recognized at that time membership *in absentia*.¹⁹

The cost of the life of a law student in London, in addition to that of the journey, must have been a deterrent to a great many young Americans. In 1762 Philip Livingston, Junior, wrote from London: 'The only circumstance that may be disagreeable, in my present Connection, is that of expences, which I am afraid will be greater than what my Father at first intended, but I have lately wrote him, that I find it will be impossible for me to live here, on less than four Hundred and fifty Pounds Ster: per Ann: which undoubtedly is the Case, for the Rent of Chambers being high, the Expences of Servant, Cloaths, and other et cetera's, so many and so great, that it is absolutely impossible for an American, who has never lived in London, to have an idea of it'.²⁰ It is probable that Philip lived in a fashionable set. In 1760 the father of Charles Carroll wrote, 'I think a student in ye Temple cannot apply himself properly to his studies and spend above £300 a year; whether you spend £250 or £300 a year, is to me immaterial, but to you it cannot be so, if by spending your money you misspend your time, which to you is more precious than money'.²¹ But even £250 a year was in the eighteenth century a substantial income.

The expense of attendance at an Inn does not seem to have been worth while from a professional point of view. For Mr. Hamlin's review of the careers of twelve native New York lawyers who actually attended the Inns of Court led him to the discovery that not one of them reached 'top place in professional standing in the colony', and to the conclusion that the training available in the province itself would more adequately prepare a young man for his legal career.

¹⁸ P. 19.

¹⁹ The case of Andrew Hamilton is interesting in this connexion. He was born *circa* 1656. While visiting England in 1713 he was admitted to Gray's Inn on January 27, 1713-4. Two weeks later he was called to the bar 'per favor'. P. 32.

²⁰ Pp. 21-2, quoting from 'William Alexander Papers'. Twenty-three members of the prominent New York family of Livingston were lawyers between 1686 and 1786. Robert Livingston, Junior, b. 1688, was the first New Yorker to join an Inn.

²¹ P. 34, quoting the 1902 edition of 'Carroll Letters' by T. M. Field.

There is an apparent exception to this generalization in the case of James De Lancey, Junior. He was born in America about 1700, and educated at Eton, Cambridge, and Lincoln's Inn. He was appointed Associate Justice of the Supreme Court in 1731, and Chief Justice in 1733. But these appointments at so youthful an age were obtained by influence, a fact which was still remembered thirty years later. In 1765 Lieutenant-Governor Colden, writing to the Earl of Halifax, referred to the fact that 'Mr. De Lancey had by cajoling Mr. Clinton [the Governor] received the Commission of Chief Justice'.²²

About 1725 a younger generation, notable among whom were James Alexander and William Smith, Senior, began to become prominent. It was this generation which completed the process of making the law of England the basis of the law of the province. Mr. Hamlin expresses the opinion that 'probably New York has never had a more influential body of citizens than this group of lawyers which during the second quarter of the eighteenth century controlled its policies in such masterly fashion'. Their success led to such improvement of the facilities for legal training at home that after 1750 few young men went to England for this purpose.

During the first fifty years of English control the question what qualifications a young man must possess in order to practise did not arise because most of the lawyers appearing in the Courts had already practised in England. But in the late 1720's it began to agitate the leaders of the New York bar, and on June 9, 1730, the Supreme Court, under the Chief Justiceship of Lewis Morris, made an order on the subject, the first of its kind in the province. It ruled that no candidate should be recommended to the Governor for a licence to practise as an attorney at law 'unless it shall appear that the person who Shall Sue for such Lysense had served for the term of Seven years with some Attorney of this Court'.²³

This was in the same year as that in which an Act of Parliament passed in the second year of George II (cap. 23) took effect in England. It enacted that no person was to be admitted as an attorney or as a solicitor unless he had been examined by the judges of the Court in which he desired to practise, and in order to qualify for being examined he must have served a five years' clerkship with an attorney or a solicitor of that Court.

²² P. 36.

²³ P. 36.

In 1756 the bar of New York which at about this time was, to the alarm of some, aiming at making the legal profession dominant in the councils of the province, adopted a strict set of regulations for clerkships. A student-law-clerk was required to be a graduate of some University or College (having resided four years and attained a Bachelor's Degree) and to bind himself by indenture to serve a clerkship of at least five years. Before admission to the bar he was required to undergo an examination and to present a certificate of qualification signed by at least six attorneys. A disputed question as to the fees payable for a clerkship was settled. Each prospective clerk was to pay £200 down on beginning his service. In 1764 the requirement of a degree was dropped.

Whether or not the authority assumed by the leaders of the bar was usurped, it was abandoned in 1767, when an order was again made by the Supreme Court, requiring the service of a clerkship for five years (reduced to three if the clerk was a B.A.), and a certificate of competence signed by the attorney with whom the clerk had served.

It is surprising that the Court did not follow the lead previously given by the bar in prescribing an examination. But no general order on the subject can be traced. It is clear, however, that on some occasions at any rate an oral examination was held.²⁴

Few articles of apprenticeship have survived. The text of one example is given, namely, the indenture signed in 1742 by William Livingston, apprenticing himself to James Alexander, the outstanding New York lawyer of the time.²⁵

With the apparatus then available the life of a legal apprentice was not an enviable one. The same William Livingston voiced a bitter complaint against the drudgery of copying documents and the lack of instruction in an article published in James Parker's *The New-York Weekly Post-Boy* in 1745. It begins with the statement so often made in all ages, 'There is perhaps no Set of Men that bear so ill a Character in the Estimation of the Vulgar as the Gentlemen of the Long Robe: ', and contains the following *cri de coeur*, 'To make a young Fellow trifle away the Bloom of his Age, when

²⁴ *E.g.* on October 24, 1771, the Supreme Court ordered: 'That Mr Attorney General, Mr. Hicks, Mr. Duane, and Mr. Samuel Jones do attend this afternoon at six o'clock at the house of Richard Bolton in the Broad Way, in order to examine the Gentlemen who have made applications for Lycenses to practice in this Court, and that said Examination be held in the presence of such of the Judges of this Court as shall attend.' P. 50.

²⁵ P. 41.

his Invention is readiest, his Imagination warmest, and all his Faculties in their full Vigour and Maturity, in a servile Drudgery nothing to the Purpose, and fit only for a Slave to submit to; is a Conduct as they especially ought not to be guilty of, who have for many years been conversant in the study of Law and Equity, and pretend to a quicker sense of Right and Wrong than their neighbours'.²⁶

Twenty-five years later Peter Van Schaack wrote that he did not know more than one or two lawyers who did tolerable justice to their clerks. 'For my part, how many hours have I hunted, how many books turned up for what three minutes of explanation from any tolerable lawyer would have made evident to me! It is in vain to put a law book into the hands of a lad without explaining difficulties to him as he goes along'.²⁷

In the chapter entitled 'The Law Student's Curriculum' Mr. Hamlin first refers briefly to William Fulbeck's *Direction or Preparation to the Study of the Law*, 1600, to William Phillips' *Studii Legalis Ratio*, 1662, and to the courses of study outlined by Coke and Hale. He then refers to *Instructions for the Study of Law* addressed by Sir Thomas Reeve, Lord Chief Justice of the Common Pleas, to his nephew about the year 1736. It appears from the account given by Foss that this little-known Judge was a very successful and learned man, but he died young in 1737, having served only three years as a puisne judge and one year as Chief Justice. His *Instructions* were known in America in the middle of the century, for John Adams referred in 1760 to the desirability of following them.²⁸ It may be that they were circulated in manuscript, for in *Collectanea Juridica*, 1791, they are described as 'now first published from a MS. in the possession of the editor'.²⁹

Reeve recommends for initial study *Wood's Institute*, with reference to *Les Termes de la Ley* and *Jacob's Dictionary*, and he advises a second careful review of *Wood* at a later stage. *Wood's Institute* is not now remembered, but it had a very considerable success in its day, reaching a tenth edition in 1772.³⁰

²⁶ Quoted in full pp. 167—170.

²⁷ P. 43. Van Schaack had recently worked in the office of the very learned William Smith, Junior, whose advice to students is referred to later. It does not appear whether Van Schaack intended to include Smith in his general indictment.

²⁸ See the passage quoted below from John Adams' Diary.

²⁹ I am indebted to Mr. Hodgkinson, Librarian of Lincoln's Inn, for bringing this point to my notice.

³⁰ The D. N. B. gives a full account of Thomas Wood, 1661—1722, scholar of Winchester and Fellow of New College. He was a classical scholar as well as a lawyer, and in middle life took Orders. Sir William Holdsworth (H. E. L. xii, 419) gives some account of his 'Institute of the Laws of England', stating 1722

A programme much more ambitious than Reeve's was drawn up, about 1756, by William Smith, Junior (1728-93). This man, one of the fourteen children of the William Smith previously mentioned, had a distinguished and varied career. He graduated at Yale at the age of seventeen, at nineteen he obtained, presumably through family influence, a clerkship in Chancery, he acquired a large practice, and was appointed at the age of forty-one, a member of His Majesty's Council for New York. He was for two years³¹ Chief Justice of New York, but left the country owing to his loyalist sympathies. He was Chief Justice of Canada from 1786 till his death in 1793. Learned, even as a boy, he became a well-known writer as well as a busy lawyer.³²

Smith demanded in a lawyer a high standard of general intellectual attainment, as will be seen in his *Directions Relating to the Law*.³³ In that part of his *Directions* which deals with the study of law he advocates the reading of Roman Law and Public International Law (the Law of Nations), but he thinks that a general view of the common law should first be acquired.³⁴ The books which he says should be 'read twice or three times over with the utmost diligence and application' are a most interesting selection: namely, (1) Hale's *History of the Common Law*, (2) Fortescue's *De Laudibus Legum Angliae*, (3) Sir Thomas Smith's *De Republica Anglorum*, (4) the first book of *Doctor and Student*, (5) the second part of Sir Francis Bacon's *Elements of the Common Laws of England*, entitled *The Use of the Law for Preservation of our Persons, Goods and Good Names*, and (6) Wood's *Institutes of the Common Law*.

After a general view of the common law has been obtained in this way, he advises the reading of certain books on the Laws of Nature, the Law of Nations, and the Civil Law, and continues as follows: 'Then to fill up and enlarge your ideas you may read Bacon's [*i.e.* Matthew Bacon's] *Abridgement of the Law*, which it is presumed will be soon all published. In reading this *Abridgement*, which is contrived so as to be read pleasantly, I would advise that you constantly refer from the *Abridgement* to Wood, and from Wood to the *Abridgement*,

as the date of the first edition, while the D. N. B. states 1720. Among Wood's other writings were an 'Institute of the Civil Law', 1704, and a 'Treatise on the First Principles of Law in General, out of French', 1705.

³¹ Apparently 1781-83, but the figure 1778 appears against his name on p. 206.

³² He wrote a history of New York and numerous articles on political subjects.

³³ Printed, pp. 197-200, from his *Commonplace Book* in the New York Public Library.

³⁴ May I, in all humility, say that I have often ineffectually urged this view upon my colleagues.

because I would have these books the basis or foundation of all your studies'. As to the reports, he advises that they should be read 'as they are referred to from the Abridgements, otherwise they will confound you'; but not until the *Abridgement* has been read through once. The first volume of the first edition of Bacon's *Abridgement* was published in 1736, the fourth volume in 1759, after Bacon's death. The fifth and last volume was written by Owen Ruffhead. The *Abridgement* was, and still is, a very useful work, but the principal credit belongs to Lord Chief Baron Gilbert whose manuscript Bacon used: Professor Winfield tells us that 'he had as little inclination to supply the deficiencies of Gilbert's MSS. as he had sagacity to mark or to correct his errors'³⁵. Sir William Holdsworth³⁶ has pointed out that Bacon's *Abridgement* deserves remembrance as being first in the line of an evolution which culminated in Halsbury's *Encyclopaedia*. For while the *Abridgements* of Viner and his predecessors were constructed after the pattern of Rolle's, being notes of cases and statutes roughly put together under alphabetical heads and somewhat arbitrarily chosen sub-heads, those of Bacon and his successors were collections of scientifically constructed treatises in alphabetical order. The transition stage between the old style and the new is marked by the *Digest* which was the life-work of Chief Baron Sir John Comyns, who died in 1740.

For the study of Equity Smith says, 'I would advise you to read a book intitled a treatise of Equity lately printed, afterwards take the Abridgement of Cases in Equity next in hand and refer from the treatise as you did from Wood to the first Abridgement and from the first Abridgement to Wood'. As Smith did not name the author of the treatise on Equity, I suggest that probably the book was the one described by Sir William Holdsworth in his *Sources and Literature of English Law*,³⁷ and stated by him to have been published anonymously in 1737, and to have been written, almost certainly, by Henry Ballow, who held a post in the Exchequer and was said by Dr. Johnson to have been a very able man.

Smith's insistence upon the desirability for a lawyer of scholarship in fields other than legal suggests to Mr. Hamlin the following startling statement:³⁸ 'Although', he writes, 'this does not appear to have been the attitude in New York,

³⁵ The Chief Sources of English Legal History, p. 243.

³⁶ H. E. L. xii, 168-9.

³⁷ Pp. 189-190. There is a detailed account of Ballow's book in Holdsworth, H. E. L. xii, 191-2, 222-37.

³⁸ P. 62.

it is said that a lack of a rounded education diminished the reputations of such men as Francis Bacon, Edward Coke, William Blackstone and Lord Mansfield'. One can only ask what Mr. Hamlin's authority is for the currency of this 'saying', and why he quotes it without comment.

How courageously some eighteenth century students embraced the stern intellectual discipline imposed by the legal literature of those days is exemplified by the passage in the Diary of the John Adams previously mentioned. This son of a Massachusetts farmer, writing in November, 1760, criticizes himself severely for his lack of application. The list of books which he admits having read would make a modern student quail, but this is not enough. 'All this series of reading has left but faint impressions and a very imperfect system of law in my head. . . . I must form a serious resolution of beginning and pursuing through the plans of my Lords Hale and Reeve. Wood's *Institutes of Common Law* I never read but once, and my Lord Coke's *Commentary on Littleton* I never read but once; these two authors I must get and read over and over again.'³⁹

Life was made much brighter for the beginner by the publication of Blackstone's *Commentaries*. Blackstone had begun to lecture at Oxford in 1753. Even before his first volume was issued in 1765 his reputation had spread to New York. In 1762 an important New York merchant, John Watts, wrote in a letter to Sir William Baker, introducing Peter De Lancey, who was leaving for London to study at Lincoln's Inn, 'We have a high Character of [*i.e.* we hear enthusiastic reports about] a Professor at Oxford, who they say has brought that Mysterious Business [the study of law] to some System besides the System of Confounding other People and picking their Pockets, which most of the Profession understand pretty well'.⁴⁰ The publication in England of the first edition of the *Commentaries* was completed in 1769. As early as 1771 the publication of the first American edition, by Robert Bell, of Philadelphia, had been begun. It was a subscription edition, the figures of which are startling. At least 840 subscribers ordered 1,557 sets. In 1774 a second edition was advertised as being in the press. In 1775, as is well known, Burke said in his speech on conciliation with the American colonies, 'I hear that they have sold nearly as many of Blackstone's *Commentaries* in America as in England'. New York led the way, for although its population was much smaller than that of Massa-

³⁹ The passage is quoted in full on p. 107.

⁴⁰ P. 27.

chusetts, Pennsylvania and Virginia, it took 342 sets, while the other three provinces took 131, 308 and 138 respectively. Of the transcendent influence of the *Commentaries*, Maitland said in his famous Rede Lecture, with his incomparable felicity, 'James Kent, aged fifteen, found a copy, and (to use his own words) was inspired with awe; John Marshall found a copy in his father's library; and the common law went straight to the Pacific'.⁴¹

Previously no law books of general application had been published in America⁴²: during almost the whole of the colonial period there was complete reliance on England for legal books.

There is nothing to be said about law schools during the period, because there were none. The earliest one in what had been the Province, and had become the State, of New York, was that of Peter van Schaack. He was an outstanding scholar at the King's College of New York, where he graduated in 1767. He worked so hard upon the revision of the laws of New York in 1771-2 that he strained his eyes and became blind. He had a large house in the country where he opened a law school in 1786 and maintained it for forty years. He died in 1833 at the age of 86. Over a hundred students had passed through his hands. In the neighbouring State, Connecticut, a Judge Reeve opened the Litchfield Law School in 1784.⁴³

An interesting chapter is devoted to the subject of library facilities. An examination of the reports of cases argued during the early part of the eighteenth century shows that prominent lawyers at that time must have had well-stocked libraries. The best known is that of Chief Justice Lewis Morris. Unfortunately no catalogue of it exists. We are more fortunate in regard to that of James Alexander, who moved from New Jersey into New York City in 1723, and brought with him the largest law library known to have been collected in the colony before 1760. In the manuscript book which is called his '*Diary*' he recorded in 1721 a collection of more than two hundred books, of which one hundred and fifty-two were legal.⁴⁴ Entries in the *Diary*

⁴¹ English Law and the Renaissance, 32.

⁴² Mr. Hamlin says that the only law books printed in America before 1771 were the laws of colonial assemblies, the records of some outstanding trials, and the texts of certain legal opinions and arguments. P. 71.

⁴³ In 1779 a chair of law was founded at William and Mary College in Virginia. In the same year Isaac Royall of Massachusetts, then resident in London, made his will giving property to Harvard College for establishing a professorship of law. Thayer, H. L. R. ix, 171. The Royall Professorship was actually founded in 1815: its distinction has been enhanced by the tenures of John Chipman Gray and Joseph Henry Beale.

⁴⁴ A photograph of this part of the catalogue is reproduced between pp. 76 and 77.

show that he lent books to a large number of borrowers, sometimes, but not usually, charging a fee. Among the borrowers were many of those who supported the movement which led to the founding of the first public library in New York City in 1729, and of King's College in 1754. Other notable libraries were those of William Smith, Senior, 1697—1769, a judge of the Supreme Court in 1763, and Joseph Murray. As Smith left fourteen children his library was divided. Part of it went with his son, Chief Justice William Smith, to Canada.⁴⁵ Joseph Murray, who died in 1757, bequeathed his library to King's College. The books were stored in the City Hall, and when this building was commandeered by the British in 1776, they were dispersed. A remnant of them form the Murray Collection of the Law School of Columbia University.

It would be possible to criticize Mr. Hamlin's style and the arrangement of his subject-matter. But he tells his story readably, and there can be nothing but praise for the meticulous industry upon which it is based. I myself feel particular gratitude for the pleasure and distraction which several readings of the book for the purpose of this review gave me during the anxious months of July and August, 1940.⁴⁶ I hope that libraries in this country will buy it, so that at any rate some English lawyers may be reminded by it that history has set no geographical bounds to the development of the Common Law.

⁴⁵ Mr. Hamlin gives us the interesting information that most of the well-to-do lawyers of New York remained loyal to the mother country, and that not half-a-dozen of them remained in practice after the war. The banished loyalists took such of their books as had survived the struggle to England, Nova Scotia, New Brunswick or Canada. P. 90.

⁴⁶ Its interest is enhanced by portraits of six of the lawyers of whom it treats, and by a number of facsimiles. And it is admirably indexed.

*MIDDLETON'S CASE AND THE LARCENY ACT, 1916.**

J. W. C. TURNER.

IN English law the definitions of the most important crimes were framed in an age when economic conditions and social relations were simple and when the paramount need was to give protection rather against violence than against deceit. As time passed a much more complicated economic order developed and in consequence of this evolution the intellectual aspect of crime gained an ever increasing prominence at the expense of the physical aspect. Not only did more subtle forms of transgression in the economic sphere, such as are now the crimes of forgery, obtaining by false pretences, etc., make their appearance, but also the lines of demarcation between what should be regarded as business astuteness and what should be stigmatized as criminal fraud became more and more difficult to draw. What is, however, particularly interesting to note is that this development in the nature of crime even penetrated and affected such a simple offence as larceny, which in its essence is physical. Originally in our law larceny depended on a trespass *vi et armis*, but in the later history of this felony we can see the physical aspect gradually receding in importance. This has been largely due to the fact that the Courts were confronted with examples of misdeeds which the rules of the existing law did not really cover, and under pressure of a general recognition that such conduct merited punishment, the judges, in default of legislative changes, were impelled to have recourse to the practice of extending the limits of existing definitions by fictions and forced constructions, so as to be able to punish acts which had never before been within the reach of penal repression.

In the case of *Middleton*¹ is to be found an expression of the feeling that the ancient common law of larceny was too simple to meet the more elaborate needs of modern society. For the proper study of *Middleton's Case* a somewhat detailed examination of the previous developments of the law of larceny

* The contents of this article are drawn from a monograph on Larceny and Kindred Offences which is being prepared by the author under the auspices of the Criminal Science Committee of the Faculty of Law.

¹ (1873) 42 L. J. M. C. 73; L. R. 2 C. C. R. 38.

is desirable; but in the limits of an article this is impossible, and therefore dogmatic reference must be made to such cases as the *Carrier's Case*² and *Pear's Case*³ without the arguments on which are based the conclusions reached in respect of them. It must suffice then to say that the Court came to the actual decision in the *Carrier's Case* without giving any *ratio decidendi*, probably for the very good reason that there was indeed no authority for it. At a later period, however, it was accepted by the judges as though it laid down the principle that a bailee who 'broke bulk' thereby determined the bailment, caused the owner's original consent to die out, and enabled the Courts to regard the late bailee as a person who at that moment feloniously took and carried away the goods *invito domino*. The same desire to reach the dishonest bailee who on the ancient definition of theft had eluded punishment led to the decision in *Pear's Case*, and to the establishment of the unsound doctrine that

'if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them so that part of the transaction is incomplete and the parting with the possession has been obtained by fraud—that is larceny'.⁴

This is based on the fallacy that whereas a contract of bailment induced by fraudulent misrepresentation is in a civil case merely voidable it is yet to be regarded as void for the purposes of criminal law, so that it may be held that there is no bailment and no transfer of possession with the consent of the owner.⁵ Thus was the anomalous crime of 'larceny by a trick' created. Since the Act of 1857⁶ which by a simple statutory change made it possible for a bailee to commit larceny whether or not he broke bulk, it has not been necessary to preserve the doctrine of *Pear's Case* for criminal cases, and in 1907 it was judicially stated⁷ that

'the expression "larceny by a trick" is not really a legal expression indicating a distinct kind of larceny. It is merely a convenient, or perhaps it may be said, . . . an inconvenient, mode of describing certain cases of larceny

² (1473) Y. B. 13 Edw. 4, Pasch. pl. 5.

³ (1779) Old Bailey Sept.; East 2 Pleas of the Crown, 685; 1 Leach 212.

⁴ *R. v. Russett* [1892] 2 Q. B. 312, per Lord Coleridge, C.J., at p. 314. See East 2 P. C. chap. xvi, par. 113.

⁵ For criticisms of this doctrine see Beale, 'The Borderland of Larceny' (1892) 6 Harv. L. R. 248; Hamson, 'The Effect of a Secret Fraudulent Intent' (1935) L. Q. R. vol. 51, p. 653; Hall, *Theft, Law and Society* (1935) p. 11.

⁶ 20 & 21 Vict. c. 54, s. 4, replaced by 24 & 25 Vict. c. 96, s. 3.

⁷ *Oppenheimer v. Frazer & Wyatt* [1907] 2 K. B. 50 at p. 77, per Kennedy L.J.

in which the goods have neither been taken by force nor clandestinely without the knowledge of the owner'.⁸ The rule of *Pear's Case*, however, did require that the offender should have the *animus furandi* at the very time when, by deceit, he induced the owner to transfer to him the possession (but not the ownership) of the chattel.

Middleton was a depositor in a post office savings bank. He gave notice to withdraw ten shillings. He received a warrant for ten shillings and a letter of advice was sent from headquarters to the post office to pay out this sum to him. He went to the post office and handed his book and warrant to the clerk. The clerk, by mistake, referred to the wrong advice note and in accordance with it placed £8 16s. 10d. on the counter, and entered that amount in the prisoner's book as paid to him. The prisoner, well knowing it was a mistake, took the money and went away.

Three points of fact are quite clear: (a) the clerk made no mistake of identity as to the coins; (b) the clerk made no mistake of identity as to the person of Middleton; he definitely intended to pass the cash to the prisoner and no one else; (c) the prisoner was guilty of no fraud or misrepresentation whatever. It follows, therefore, (1) that if the clerk had no authority to transfer ownership, even then the doctrine of *Pear's Case* would have no application, for, as we have seen, this requires that at the time of taking possession the taker must have negatived the owner's consent by deceit, which was not the fact here; (2) that if the clerk had authority to transfer ownership, he did in fact transfer it and, therefore, there could be no larceny, for the doctrine of *Pear's Case* had never been thought to apply to transfer of ownership; (3) that if the clerk had authority to transfer, and did transfer ownership, there could be no offence of obtaining by false pretences.

The prisoner was convicted at the Central Criminal Court and the case was reserved for the opinion of the Court of Criminal Appeal. Middleton was obviously a dishonest man, and none of the fifteen judges felt otherwise about him. It must be remembered, however, that he was probably a poor man and was confronted with a great and sudden temptation. Bramwell B. recognized this,⁹ and he said ¹⁰:

⁸ That the phrase 'larceny by a trick' may still create some confusion can be seen, for example, by comparing pages 483 to 485 with pages 311 and 312 of Stephen's Digest of the Criminal Law (7th ed., 1926).

⁹ 42 L. J. M. C. at p. 84.

¹⁰ At p. 85.

‘There is more doubt in the case than has appeared to some who seem to me to reason thus: The prisoner was as bad as a thief (which I deny), and being as bad ought to be treated as one, which I deny also.’

But the anxiety to prevent his escaping led the majority of them into some curious arguments. Eleven judges were in favour of conviction and four were against it. Seven of the eleven based their decision on two main arguments. They adopted the view that the clerk had authority to part with the ownership of the money, but they thought that he did not, in fact, pass the ownership to the prisoner because

‘It was simply handing it over by a pure mistake, and no property passed.’¹¹

Their judgment compared the *Middleton Case* to that of a person who goes to a warehouse with an order for beans to be selected from bulk and ‘by some strange blunder, the merchant delivers to him an equal bulk of coffee’. But this case supposed by these judges is entirely different, for their imaginary merchant had made a complete mistake of identity of the goods handed over. The post office clerk made no such fundamental mistake; he knew perfectly well that he was handing over the very note and coins that he intended to hand over. From a further example taken by the Court of a person handing to a cabman a sovereign in mistake for a shilling, it is clear that these judges were not basing their decision on the point that the clerk had no authority to transfer ownership: they were ready to assume that he had such authority. But here again the case imagined is different, for the passenger does make a mistake as to the identity of the coin, so that this example is open to the same objection as the other about beans and coffee.

Their other point was that although the clerk did intend to pass possession of the money,

‘yet, if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is a sufficient taking’.¹²

This is either an error as to the facts of *Middleton's Case* or an error as to the law as it then stood on the authorities. The material words to be considered are ‘from the beginning’, ‘obtained possession’ and ‘taking’. We must first note the word ‘taking’. In its strict sense ‘taking’ in connexion with larceny refers to a physical act and is a translation of the Latin word ‘*cepit*’ in the earliest definitions. The conception of

¹¹ At p. 77.

¹² At p. 76.

possession was originally quite simple, and connoted a mere physical mastery over the chattel. The thief seized (*cepit*) it and carried it away (*asportavit*). The word '*cepit*', however, was taken¹³ to indicate something more, namely that the chattel was not handed over by the owner, for example, so as to create a bailment, for in that case there would be consent by the owner. It could therefore be described as a receipt and not a taking. To begin with, wherever there was such a 'receipt' from the owner,¹⁴ there could be no larceny, for '*cepit*' would be inapplicable to the facts. It would seem that at the earliest stage in the development of our law of larceny there could be no felony in any case where the owner transferred the thing¹⁵ (*i.e.* where it was a case of receipt and not of taking) and therefore at that period the word '*cepit*' was enough to indicate that there was no consent by the owner. However, it is plain that an owner, without himself touching his chattel, may consent to another's taking it, and so we find that the words *invito domino* appear in the definition. On the one hand, the presence of these two words limits the meaning of '*cepit*' to a mere physical taking without any reference to the mental state of the owner, as opposed to a receipt, which suggests consent on the part of the owner. Strictly, therefore, the word 'taking' ought to be used in a correspondingly narrow sense and ought not to be employed to indicate a 'taking-without-consent'. On the other hand, however, the increasing sophistication of the conception of possession produced cases such as that of the servant, the guest and so on, in which there was receipt and yet larceny could be committed, and then the phrase '*cepit et asportavit*' came to have mainly a procedural significance. None the less, it is dangerous, even at the present day, to be careless in the selection of words, for to employ the words 'it is a sufficient taking', as in the judgment before us, is unfortunate, because it obscures the necessity to satisfy the requirement that the taking must be *invito domino*. If the words used had been 'yet none the less the prisoner is deemed to have taken the chattel *invito domino*', attention would have been directed to the vital point in the doctrine of *Pear's Case* and it might have been realized that *Middleton's Case* did not come within that doctrine. As we have seen, the doctrine of *Pear's Case* was based on the essential necessity of finding some means of negating consent on the part of the owner. This was done by the forced and

¹³ See Coke, Inst. III, 107.

¹⁴ *E.g.* by a servant.

¹⁵ *E.g.* even to a guest or to a servant.

fictitious argument that the deceit by the prisoner had acted on the mind of the owner so as to induce him to part with the possession. Clearly, therefore, this deceit must have been practised before and not after the owner formed the intention, and thus consented to transfer the possession of the goods. Artificial as the view of the facts taken by the judges in *Pear's* and subsequent cases may be, yet in its most extreme form it was always based on the assumption that the prisoner must be regarded as having, by deceit, induced the transfer, and that this deceit negated the consent of the owner; but it is impossible even to advance such a fiction except on the footing that the prisoner had at least the *animus furandi* (even though he had not yet openly made any false representations to the owner) before the owner decided to transfer the goods. There is, so far as I have discovered, no reported case before that of *Middleton* in which this essential sequence of fact cannot be observed. Unless, therefore, the seven judges in *Middleton's Case* recognized this in their judgments, they were wrong in law. It would be necessary then, in order to preserve them from this accusation, to interpret their words as meaning that in point of time the prisoner's *animus furandi* preceded the intention of the clerk to transfer the money ('from the beginning'), and that it must be deemed to have induced that intention ('and with that intent obtained the possession'). They are, however, impaled on the other horn of the dilemma, for it is plain that the facts of *Middleton's Case* do not bring it within this principle. The clerk had already decided, and had placed the money on the counter for Middleton to take, before Middleton formed the *animus furandi*. The conclusion, therefore, is unavoidable, that these judges were either wrong in their interpretation of the law ¹⁶ or of the facts, and that their decision cannot be supported. They misconceived the old principle and they did not enunciate a new one.

Two of the eleven, Bovill C.J. and Keating J., differed from the last-named seven as to the clerk's powers, for they held that the clerk did not have authority to transfer ownership of the money. They held that Middleton should be convicted because his case was

'undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post office, though he had intentionally delivered them over to the prisoner, has

¹⁶ That these seven judges were in error is clear from their quoting as authorities the cases of *Davenport* (2 Russell on Crimes (9th ed.) p. 822) and *Savage* (5 C. & P. 143) in each of which the owner was induced by false statements to make a bailment of his goods to the prisoner.

been held to be a larceny, on the principle that the post-master had not the property in the articles, or the power to part with the property in them'.¹⁷

This statement of principle is also misconceived: we have seen that the point of the doctrine of *Pear's Case* is the absence of the owner's consent, due to fraud by the prisoner, in the case where what is contemplated is the transfer of possession, but not of ownership. An intention to transfer ownership takes the case out of the doctrine: therefore the danger in cases of this kind which the prosecution had to face was always that an intention to transfer ownership might appear. There was no question as to the doctrine of *Pear's Case*, once it was clear that possession only had been transferred. It was accordingly a matter of evidence as to what was intended to be transferred and attention was therefore focused on this, and the point was emphasized in some of the cases decided after that of *Pear*. Unfortunately any one reading the reports, who did not bear in mind the history and the true principle of the rule in *Pear's Case*, could fall into the error of regarding a point of evidence as a point of law. In the reports of the cases referred to by Bovill C.J. (*Pearse*,¹⁸ *Kay*,¹⁹ *Jones*,²⁰ *Gillings*²¹ and *Longstreeth*²²), the established legal principle is to be found underlying the decision in every one; they could not properly be decided on any other principle, and the fact that an absence of authority to pass ownership could be taken as conclusive evidence of no intent so to do, does not make the former the *ratio decidendi*. Indeed, it is to be remarked that although the Chief Justice's words²³ can only in reason be taken as suggesting that all these cases were decided on the point of absence of authority, yet when the reports are examined, it will be found that there is no allusion whatever to absence of authority in three of them (*Pearse*, *Jones* and *Gillings*). In *Kay's* case the word 'authority' is incidentally used, but it is used of authority to hand over possession and not of authority to transfer ownership. In *Longstreeth's* case alone is the statement made as to absence of authority to transfer ownership, but in that case there was no discussion at all of the legal principle

¹⁷ At p. 79.

¹⁸ 2 East P. C. 603.

¹⁹ Dears. & B. 231. The reasoning justifying the conviction in this case Bramwell B. said (at p. 85) was 'such as ought not to exist in any law, most especially not in the criminal law'.

²⁰ 1 Den. 188.

²¹ 1 F. & F. 36.

²² 1 Mood. 137.

²³ At p. 79.

of the *Pear* doctrine: it must be assumed, therefore, that the doctrine was well understood and no discussion of it was needed. All that was necessary was to make certain that the facts admitted the doctrine, *i.e.* to make sure that no transfer of ownership was contemplated; this was proved most strongly by the evidence that there was obviously no authority to transfer ownership. It is curious that the Chief Justice proceeded to make further remarks which state one of the essentials of the true principle, although he did not appear to recognize that he was not applying for it: for he says

‘In all these and other similar cases . . . the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant to whom the property had been entrusted for a special purpose, and where property is so taken by the prisoner knowingly, with intent to deprive the owner of it, and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny’.

Here is an indication that the absence of consent is material: there is, however, a failure to appreciate that in all these cases the prisoner had induced the transfer by false statements and had thus satisfied that requirement of the *Pear* doctrine.

The judges also said

‘The clerk, in one sense, never intended to part with the £8 16s. 10d. to the person who presented an order for only 10s., and he placed the money on the counter by mistake, though at the time he (by mistake) intended that the prisoner should take it up . . .’

This kind of argument is highly fallacious,²⁴ and it is remarkable that such distinguished judges should have adopted it. For the mistake was not as to what he was doing,²⁵ which was the relevant point, but as to his reasons for doing it, which were not relevant.

Kelly C.B. also based his judgment on the absence of authority to pass ownership.²⁶ He, too, in thinking that this brought the case within the principle of *R. v. Longstreeth*, gave another example of mistaking evidence for law. Once again, therefore, in the joint judgment of Bovill C.J. and Keating J., and the judgment of Kelly C.B., we find a failure to appreciate the existing principles and the absence of the enunciation of any

²⁴ As was pointed out by Bramwell B. at p. 84.

²⁵ ‘The clerk intended A to receive what he ought to have intended B to receive, but it was not the less his intention that A should receive what he handed over to him’: *per* Cleasby B. at p. 93.

²⁶ At p. 80.

new one. Pigott B. also supported the conviction,²⁷ but did not agree with the arguments of the other judges. The learned Baron, however, found an avenue of escape by taking a special view of the facts, namely by holding that the money, lying on the counter, was not yet passed over into the prisoner's possession. The clerk, after putting the money on the counter, proceeded to enter the amount in the book, and this

'gave the prisoner the opportunity of taking up the money . . . The interval afforded him the opportunity of conceiving and he did, in fact, conceive the *animus furandi* while as yet he had not got the money in his manual possession'.

The learned Baron continued:

'If complete possession had been given by the clerk to the prisoner, so that no act of the latter were required to complete it after his discovery of the mistake and his own formed intention to steal it, I should not feel myself at liberty to affirm this conviction.'

This was ingenious, and if the facts had been so, would be convincing. But the weakness of the argument lies in this, that the test for larceny is that the owner does not consent to the taking, *i.e.* the prisoner must have taken the thing *invito domino*; Middleton, however, picked up the money in the presence of the clerk, and with the clerk's full assent, so that it is clear that he did *not* take it *invito domino*.

We have now examined the judgments of all those members of the Court who affirmed the conviction, and the result is negative. If we look at the number of judgments rather than at the number of judges, we find that there was one²⁸ in favour of conviction on points of fact and not of law, three²⁹ in favour of conviction on points of law, and four³⁰ in favour of acquittal on points of law. If it be proper to regard the case in this way, it does not appear to be very convincing, for there were four sets of legal argument in favour of Middleton and only three against him. However, as already suggested, the true test is in quality rather than quantity.

Turning now to the judgments in favour of acquittal, we find that Martin B.³¹ held the conviction to be wrong, on the ground

²⁷ At p. 81.

²⁸ Pigott B.

²⁹ One judgment in which Cockburn C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald JJ. concurred; one judgment in which Bovill C.J. and Keating J. concurred; and one judgment delivered by Kelly C.B.

³⁰ Martin B., Bramwell B., Brett J., Cleasby B.

³¹ At p. 82.

that no trespass had been committed, and expressed agreement with the judgments of Bramwell B., Brett J. and Cleasby B.

As might be expected, Bramwell B. produced arguments backed by vivid examples. Pointing out that the case fell to be decided by the rules of common law, he emphasized the rule that the taking must be *invito domino*, which does not mean against his will, but without it. Alluding to the rules based on the *Carrier's Case* and on *Pear's Case*, he said³² that the cases were

‘brought within the rule indeed, but by reasoning which ought to have no place in criminal law’.

There was no mistake by the clerk as to what he did: to argue so would be the same as saying that if A, intending to kill B, shoots at C, mistaking him for B, there is no intentional murder at all, for he did not kill B, and did not intend to kill C.

‘If the reasoning as to not intending to give this money is correct, then, as it is certain that the post office clerk did not intend to give Middleton 10s., it follows that he intended to give him nothing . . . In truth he intended to give him what he gave, because he made the mistake.’

He replied to Baron Pigott's argument by stating the impossibility of drawing any distinction between putting the money on the counter and putting it in the prisoner's hand.

On the point of absence of authority, Baron Bramwell considered that to say it was taking *invito domino* involved regarding the Postmaster-General or the Queen as the *dominus*. But the clerk had authority to decide under what circumstances he would part with the money with which he was entrusted, and so must be considered as the *dominus* within the rule of larceny.

Brett J. also thought the conviction wrong. His points were that the clerk had the same authority as any other bank clerk, a general authority—

‘he had authority to part not with any specific money, but with any of the money entrusted to him to any one of all the persons who should properly present a genuine warrant’.³³

Brett J. took the point³⁴ that so long as the owner intended that the property should pass, it makes no difference that the property does not pass; *i.e.* it is a question of fact for the jury

³² At p. 83.

³³ At p. 89.

³⁴ At p. 88: quoting the words of Blackburn J. in *R. v. Prince* (1868) 38 L. J. M. C. 8.

as to what the owner intended and not a question of law. He thought, however, that if the clerk had not had authority to pass ownership, but merely possession, the prisoner could be properly convicted of larceny; in this he overlooked the requirement of the rule of *Pear's Case* that the transfer of possession must have been induced by fraud.

Cleasby B. was the fourth of the judges to think the conviction should be quashed. He agreed with Brett J. that the intention of the owner to pass the property in the goods is the material point, and it makes no difference if he should fail, for reasons of law, to do so.³⁵ He took, however, two fresh points, that there was authority to pay ten shillings to Middleton, and that the exercise of the power of the clerk was merely excessive and was valid so far as it was within the power, the excess being separable. It followed that there was a technical objection to the conviction,

'that there are no particular chattels or pieces of money in respect of which the charge of larceny can be sustained'.³⁶

This was a good point; larceny has to do with the felonious taking of specific articles, not with the dishonest acquisition of economic values, or the fraudulent manipulation of book entries. There can be no larceny of the difference between two amounts of money, but only of the specific coins or notes which represent that difference. It was incumbent on the prosecution to state which were the actual pieces of money that Middleton had stolen, and this they could not do.

It is submitted that the conclusion to which we must come is that Middleton was wrongly convicted. It may seem to involve an exhibition of excessive temerity to maintain this view when the opposite was decided by the opinions of eleven judges against four. But to decide a matter of intellectual quality by reference to an arithmetical computation is to abandon critical judgment entirely.³⁷ An error, even though it be one hundred times repeated, may make law, but it does not become a truth. Moreover, the eleven judges who supported the conviction did not all do so for the same reasons. The Courts have a duty to apply the law as they find it, but this involves their ascertaining accurately what that law is. Now either the conviction of Middleton was in accordance with existing principle, or a new principle was established in this case. If a new principle

³⁵ At pp. 91—92.

³⁶ At p. 93.

³⁷ The framers of the Valentinian Law of Citations have been criticized for this very weakness: see Buckland, *Text Book of Roman Law* (2nd ed.) p. 34.

was established, it should be in some way enunciated in the judgments, but, as stated above, a new principle cannot be found in them.

On the point of the authority of an official of the Post Office to transfer ownership of the money of the Post Office, it is interesting to note the case of *R. v. Story* tried in 1805,³⁸ which was not referred to in the case of *Middleton*. Admittedly the question whether a post office clerk has authority or not is really a question of fact, but it is not irrelevant to notice that in *Story's* case all the judges made, so far as can be seen from the report, without any hesitation, the assumption that even the wife of a deputy postmaster who transacted post office business for him, although not herself an official, could transfer ownership of the money she paid out on a money order. The prisoner had inquired of Mrs. R., the wife of the postmaster, for a letter directed to himself at the post office. By mistake she handed to him a letter addressed to another person, by the name of Storer, not noticing the difference between the names. The prisoner looked at it and, after objecting to the charge, which, however, he paid, took it outside and opened it. It contained a money order for one pound in favour of Storer. The prisoner re-entered the office and presented the order for payment. Mrs. R. directed him to endorse the order, which he did by signing his proper name of Story; but Mrs. R., still overlooking the discrepancy between the name on the face of the order and that endorsed upon it, paid to the prisoner a one pound note. The prisoner was found guilty of obtaining this note by false pretences, contrary to 30 Geo. 2, c. 24, s. 1. The sentence was respited for the opinion of the judges, on the question whether on the facts of the case the prisoner could be held to have made false representations so as to bring himself within the statute, and also as to whether the case was one of forgery. The judges all agreed it to be no forgery, but that it was a case of obtaining by false pretences.

If this be correct, it follows that Mrs. R. passed the property as well as the possession of the money to Story, because otherwise his offence could not have been obtaining by false pretences. Now the mistake made by Mrs. R. in *Story's* case is not to be distinguished in any relevant particular from that made by the clerk in that of *Middleton*. Secondly, her authority to pay out money under such a mistake cannot have been greater than his.³⁹

³⁸ Russ. & Ry. 81.

³⁹ At this date the money order business transacted through the post office was carried on as a private venture, but with official sanction and encouragement. There was a central 'Money Order Office' to the account of which payments out

Thirdly, Mrs. R.'s intention to transfer the pound note to Story cannot be said to differ materially from the clerk's intention to transfer the notes and coins to Middleton. Any points, therefore, in support of the conviction of Middleton which are based upon either the giver's absence of authority or upon the giver's absence of consent should equally apply in the case of Story. Thus there is to that extent a conflict between the two cases.

It is true that the attention of the Court in *Story's* case was not addressed to the question of authority or that of consent, but it must be presumed that the assembly of all the judges were aware of the law of larceny and that their silence on these points indicates that both consent and authority were regarded as so clearly existing as not to be worth discussion. If the same arguments as those employed against Middleton had been put in *Story's* case, they would have been in favour of Story; in order, therefore, to support the punishment of dishonesty, they must be regarded as sound in the former case and unsound in the latter. If, as was hinted by Baron Bramwell, those who favoured the conviction of Middleton were inspired by a desire that a scoundrel should not escape, we may wonder what view the judges in 1805 would have taken of the same arguments when they pointed to the acquittal of one whose fraudulent conduct was more premeditated and elaborate than that of Middleton.

That Middleton was dishonest cannot well be questioned; that the community should be protected by the criminal law against such conduct is arguable. But at that date the law did not cover such a case, and it was for the Legislature to effect an improvement by statute, and not for the judges. It has been generally accepted⁴⁰ that such a change was made by the Larceny Act, 1916, in section 1 (2) (i) (c). Doubtless if the provision has been interpreted in this sense, it may be too late to question it, but it is conceived that the words of the statute do not really support this interpretation. For the section begins:—

‘For the purposes of this Act (1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes . . .’, etc.

and in were placed (see Murray, ‘The Post Office’ (1927) p. 160; Crutchley, ‘G.P.O.’ (1938) p. 203). It is apprehended that in principle there is no material difference on the point of authority to pay out on money orders between the position of a subordinate post office official in 1805 and that of the clerk in *Middleton's Case*. It does not indeed appear that Mrs. R. was an official at all.

⁴⁰ E.g. Kenny, *Outlines of Criminal Law* (15th ed.) p. 239; Stephen's *Digest of Criminal Law* (7th ed.) pp. 307, 313; Archbold, *Criminal Pleading, Evidence and Practice* (1938) 533.

Sub-section (2) (i) reads:—

‘ the expression “ takes ” includes obtaining the possession . . . (c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained ’.

Now conceding that this provision was aimed at such a case as *Middleton's*, has it succeeded in reaching it? We have already seen that the real objection to the conviction of *Middleton* is that the owner consented to part with the money. There was no doubt whatever that *Middleton* took the money but he took it with the clerk's consent. The Larceny Act, however, in the above provision merely elaborates the word ‘ takes ’; it does not in the smallest degree remove the necessity that the taking must be ‘ without the consent of the owner ’. It leaves the *Middleton* case exactly where it was. To have made a change in the law so as to cover *Middleton's* case, quite different words would be required; for example: ‘ Provided that a person may be guilty of stealing any such thing notwithstanding that the owner has consented to transfer to him the possession or ownership thereof, if he obtains such possession or ownership with knowledge that it has been transferred under a mistake on the part of the owner.’⁴¹ The purpose of the Larceny Act is set out in the statutory description as being ‘ to consolidate and simplify the Law relating to Larceny triable on Indictment and Kindred Offences ’. It would appear, then, that the Act is not to be read as amending or altering the law in substance, and if *Middleton's* case was wrongly decided, there need be no strained interpretation of the Act in order to save the decision.

If, however, the facts of *Middleton's* case are not covered by section 1 (2) of the Act, it is necessary, in order to give a meaning to that sub-section, to examine it carefully in order to ascertain what sets of facts its language can be said to contemplate. The words are ‘ the expression “ takes ” includes obtaining the possession—

(a) “ by any trick ” ’;

The case required is where on the facts it might be argued that the offender did not ‘ take ’ the thing, but ‘ received ’ it from the owner in some way. It is perhaps mainly a matter of words, but in some of the early authorities some play was made on the difference between ‘ receiving ’ and ‘ taking ’⁴² when

⁴¹ It is by no means certain that such a provision would be a wise act of criminal policy, as it would cover cases of mistake which might better be left to the operation of the civil law.

⁴² *E.g.* Coke, Inst. III, c. xlvii (p. 107). ‘ By taking, and not by bailment or delivery, for that is a receipt, and not a taking.’

really the true point was whether the owner consented, or did not consent, to the transfer of the goods. Examples would be where a person obtains property by inserting a metal disc in an automatic machine, or in a slot gas meter. Or again, if at some such entertainment as a flower show X leaves his overcoat with an attendant at one of the stalls, saying that he will send someone for it later, and Y, overhearing this, comes later to the stall and obtains the coat by falsely stating that X has sent him for it, and absconds with it.⁴³

'(b) "*by intimidation*"'.

Here the case required is where X compels Y to hand over the chattel and thus 'receives' it. It is, of course, '*invito domino*' that X carries it away, but the point is that Y's physical movement in handing it over, although in one sense voluntary, as he prefers to do that rather than risk suffering physical violence, or other harm, yet it is declared by the statute to be a 'taking' by X.

'(c) "*under a mistake, etc.*"'.

The case required is where there is no consent and at the same time where the thief obtains possession owing to a mistake on the part of the owner. Such would be the case if, for example, X has promised to make to Y a present of a certain book of small value. X places the book on the otherwise empty table of his library; unknown to X, a member of his household replaces that book on the shelf, and later goes out, leaving on the table another book perhaps of much greater value. Y comes to the house and tells X's servant that he has called for a book: the servant goes upstairs to X with Y's message and X replies, 'Yes, tell him to take it; it is on the table in the library.' Thereupon the servant admits Y to the library, and Y, realizing X's mistake, takes away the more valuable book and sells it.

'(d) "*by finding, etc.*"'.

This paragraph seems to be intended to confirm the old common law rule about finding. But it is out of place where it now stands in the statute. The historical reason why an initially honest finder, who at the moment intends to restore the chattel, does not commit larceny if he subsequently appropriates it, is because the loser is deemed to consent to an honest man's picking up the thing on his behalf. The reason why there is no larceny in the finder who at the outset does not think he can discover the loser, and who therefore takes the thing for himself, is because he does not take '*animo furandi*' ('fraudulently').

⁴³ See also *Wilkins' Case*, O. B. Ap. 1789; 2 East P. C. 673.

It would seem that the provision contained in (d) should more logically have been expressed in rather different words in a second proviso to the definition in some such terms as

‘provided also that a person may be guilty of stealing any such thing by finding it and carrying it away where, at the time of the finding, . . .’, etc.

But, on the whole, it would seem that paragraph (d) as it now stands cannot fairly be read as intended to interpret the word ‘steals’, for clearly the words ‘and carrying it away’ must not be read into (d), because ‘carries away’ is explained expressly in (ii) of sub-section (2). Therefore it is submitted that (d) is merely an unsuccessful attempt to explain ‘takes’ and is not intended to cover any other part of the main definition. The history of finding in larceny shows a growth of ideas tending to *excuse* the finder, on the fiction that the owner must consent to his taking the thing. (d), however, indicates when the finder is *guilty*, and draws attention to the basic rule of larceny by stating that a person who finds and carries away is in fact a person who takes and carries away. The addition of the words “where at the time . . .”, etc. is unhappy, because these latter words properly should refer to the word ‘fraudulently’ in the main definition. As stated above, an additional proviso to confirm the law as to the finder would have been preferable, but even if that were not acceptable, it would have been better to have added to sub-section (2) another member as follows:—

‘(iv) The expression “fraudulently” includes the dishonest intent of a finder who at the time of finding the thing believes that the owner can be discovered by taking reasonable steps.’

Yet even if, contrary to what has been above submitted, the Larceny Act be held to have altered the common law on the point of the consent of the owner where he has passed over his property under mistake, there still remains the question raised by Cleasby B. in the particular case of *Middleton*. The question really is, which coins did Middleton steal? He was clearly entitled to receive ten shillings, although the clerk made a mistake. It might be argued that, but for the mistake, the clerk might have put on the counter quite different coins making up the amount of ten shillings, yet this is not enough. For Middleton could not know the exact nature of the mistake made by the clerk: he was entitled to receive and expected to receive ten shillings; on the counter before him more than ten shillings was placed, but he could have no *animus furandi* so far as ten shillings of it was concerned. With respect, then, to which

specific coins did the *animus furandi* operate? It may be possible for the prosecution to prove this, but the prisoner cannot properly be convicted unless they do so.

It is therefore submitted that if the facts of *Middleton's Case* should happen to recur at the present day, they ought to be held not sufficient to ground a conviction for larceny, whether or not the Larceny Act, 1916, be interpreted as modifying the common law rule as to the consent of the owner.

THE STATUTE OF USES AND THE POWER TO DEVISE.¹

R. E. MEGARRY.

IT is commonly stated that one of the many effects of the Statute of Uses, 1535, was that the power of devising land which had been acquired by means of uses was abolished.² It has also been said that this power 'would subsequently have been recovered through that construction of the Statute which afterwards gave rise to the modern system of trusts',³ *i.e.* by the enforcement of a use upon a use as a trust.⁴ The object of this article is to suggest that on the construction of the Statute which became generally accepted by the Courts the Statute never in fact made it impossible to make what was in effect a devise by means of a use, but augmented the power to devise by making it possible to pass the legal estate; and further, that this fact was recognized long before the Restoration when uses upon a use were first regularly enforced as trusts.⁵

There seems to be little doubt that the Statute was intended to abolish the power to devise.⁶ There seems to be equally little doubt that at first the Statute was generally believed to have succeeded in doing this, for one of the objects of the Pilgrimage of Grace, 1536, was the restoration of the power

¹ This article is to some extent unfinished. After writing it, I had intended to examine all the reported cases between 1535 and 1700 to see whether there were any other decisions on the wills of testators dying between the Statute of Uses and the Statute of Tenures, 1660, which would throw further light on the subject. Before I had examined a quarter of the cases, circumstances made it impossible for me to continue. I was reluctant to venture into print with conclusions based on incomplete evidence, but I allowed myself (perhaps rather too readily) to be persuaded into publication. It is therefore with the probably forlorn hope that some one else will examine these cases that I submit this article to the public eye.

² See *e.g.* Challis R. P. (3rd ed.) 168; Holdsworth H. E. L., IV, 463; Scrutton, Land in Fetters, 93; Potter, Real Property (6th ed. of Goodeve) 572; and see Radcliffe R. P. (2nd ed.) 89; Bordwell, 21 Iowa L. R. 10.

³ Challis R. P. (3rd ed.) 168.

⁴ *Sambach v. Dalston* (1634) Tot. 188 was the first recorded case in which this was done; and see Holdsworth H. E. L., V, 307—309.

⁵ See Ames, Lectures on Legal History, 246, 247.

⁶ The preamble recites (*inter alia*) the evils caused by the power to make wills (testators 'being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances'; and see *Wild's Case* (1599) 6 Co. Rep. 16b at 17a), and recites that the Act is enacted for the 'extirping and extinguishment' of these and other 'abuses and errors'.

⁷ Holdsworth H. E. L., IV, 464, 465.

to devise.⁷ Nevertheless, neither the imperfectly expressed intentions of the draftsman nor the vulgar beliefs of the populace can prevail against the decisions of the Courts, and it is to these that we must turn to find out what effect the Statute really had. An examination of these decisions shows that despite the Statute of Uses, and independently of the Statutes of Wills, 1540 and 1542, it was possible to dispose of land by will by means of uses long before the Restoration.

By the sixteenth century at least three methods of devising land by means of uses seem to have been known.

1. By the testator conveying his land to feoffees to uses to the use of the testator and his heirs⁸; the testator could then devise this use.⁹

2. By the testator conveying the land to feoffees 'to the uses of my last will'.¹⁰

3. By the testator conveying the land to feoffees 'to the use of such person and persons, and of such estate and estates as I shall appoint by my will'.¹¹

The first two methods look very different, but in effect they were the same.¹² The last two methods look much the same,¹³ but were in fact very different.¹⁴ The operation of each method and the effect of the Statute upon it was as follows:—

1. The first method causes no difficulty. The common law prohibition against devising applied only to the legal estate and did not affect the equitable use. The Statute of Uses, by executing the use, vested the legal estate in the *cestui que use* and so left him nothing which the common law permitted him to devise.¹⁵

2. The second method was not quite so simple. There was a resulting use to the testator in fee simple¹⁶ and a devise took effect not as an appointment under the power to appoint uses by will but as a devise of the resulting use¹⁷; 'the parties must

⁸ Co. Litt. 272a, n. 1, VIII, 1.

⁹ *Ibid.*; *Butler and Baker's Case* (1591) 3 Co. Rep. 25 at 33a (n. I. 1); *Cruise, Uses*, 31; *Sanders, Uses* (5th ed.) 64; *Williams R. P.* (23rd ed.) 182.

¹⁰ *Gilbert, Uses* (3rd ed.) 70; and see *Audley's Case* (1559) 2 Dy. 166a; (1573) 3 Dy. 324b.

¹¹ *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a; or 'to such uses as I shall declare by my will' (*Sir Ralph Bovey's Case* (1672) 1 Vent. 193 at 194; and see *Batley v. Trevillion* (1589) Moo. K. B. 488 at 490, 491).

¹² *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a; 'a feoffment to the use of his will, and to the use of him and his heirs is all one'.

¹³ 'The distinction . . . seems extremely subtle' (Co. Litt. 112a, n. 2 by Hargrave).

¹⁴ *Batley v. Trevillion* (1589) Moo. K. B. 278 at 280; *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a.

¹⁵ *Putbury v. Trevilian* (1557) 2 Dy. 142a; *Maitland, Equity* (2nd ed.) 35.

¹⁶ *Gilbert, Uses* (3rd ed.) 70.

¹⁷ *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a.

claim their interest by the devise'.¹⁸ Not even an express reference to the feoffment enabled the will to take effect as an exercise of the power.¹⁹ The Statute of Uses, by executing the resulting use, made devises by this method impossible.

3. The third method was the most complicated of the three. It was settled that a feoffment 'to the use of such person and persons, and of such estate and estates as I shall appoint by my will' produced a resulting use to the testator, the resulting use being not a fee simple absolute but a qualified fee, *i.e.* a fee until the testator exercised his power of appointing by will.²⁰ The testator thus had the choice of either

(a) taking advantage of the power reserved by the feoffment to appoint the use; or

(b) failing to exercise this power, with the result that on his death the fee which was vested in him by way of resulting use became absolute²¹ and could pass under a devise made without reference to the power.

Under (a), the devisee took by virtue of the feoffment and the will served merely to declare the uses²²; under (b), the devisee took under the will independently of the feoffment, the land being devised by the testator as owner thereof.²³

The effect of the Statute of Uses was to make method (b) impossible, for the resulting use became legal and could not be devised. Method (a), however, was not affected in this way; there was no devise of a legal estate, and on the testator's death the qualified fee vested in him came to an end because an appointment had been made under his power. The uses appointed by his will duly took effect, and the devisees received legal estates by virtue of the Statute of Uses.²⁴ The Statute thus augmented the power to devise: whereas before 1535 only equitable interests could be devised, by virtue of the Statute legal estates could be devised.

The difference between these alternative forms made it important to know if a will amounted to an exercise of

¹⁸ Gilbert, *Uses* (3rd ed.) 70.

¹⁹ *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a; Co. Litt. 112a.

²⁰ *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a; Co. Litt. 111b. This was so even if an express use had been declared in favour of the testator for life (*Leonard Lovies's Case* (1613) 10 Co. Rep. 78a). The qualified fee and the power to devise the fee simple did not merge but existed concurrently in the testator (*Sir Edward Clere's Case* (*supra*); *Abbot v. Burton* (1708) 11 Mod. 181; *Maundrell v. Maundrell* (1805) 10 Ves. 246; Sugden, *Powers* (8th ed.) 93 *et seq.*).

²¹ Co. Litt. 216b n. 2.

²² *Buckhurst's Case* (1595) Moo. K. B. 488 at 516; *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a.

²³ *Browne v. Taylor* (1626) Cro. Car. 38 at 39.

²⁴ *Batley v. Trevillion* (1589) Moo. K. B. 278 at 280: 'pur ceo l'entire use, & ove ceo l'entire possession de tout le terre passera'.

method (a) or method (b). This question to some extent depended on the provisions of the Statutes of Wills, 1540 and 1542, and these provisions must therefore be considered briefly.

These Statutes, which are 'exceedingly prolix',²⁵ may be summarized as follows²⁶ :—

1. A devise of land held in knights service from the King or other lord was valid as to two-thirds but void as to the remaining one-third,²⁷ which descended to the heir and was subject to the Crown's right of wardship, primer seisin and fines for alienation or to the mesne lord's right of wardship.²⁸

2. A devise of land held in socage from the King or other lord was valid as to all the land,²⁹ subject to the King's right to fines for alienation, primer seisin, reliefs and certain other rights.³⁰ This applied even if the tenant also held other land in knights service, whether of the King or another lord,³¹ except where the tenant held land of the King by knights service *ut de corona*,³² when only two-thirds of the total of the knights service and socage land could be devised.³³

3. A tenant's right to dispose of the whole of his land *inter vivos* was not affected,³⁴ but if he had disposed of some of his

²⁵ Challis R. P. 227: 'intricate and prolix' (*Leonard Lovies's Case* (1613) 10 Co. Rep. 78a at 82a).

²⁶ As there appears to be no convenient modern summary of the Statutes, the summary given here includes provisions not of immediate importance to this article.

²⁷ 1540, ss. 4, 7, 10, 11; 1542, ss. 5, 7. (The numbering of the sections employed here is that of the Ruffhead edition.)

²⁸ 1540, ss. 3, 5, 6, 8, 9, 10, 12; 1542, ss. 9, 13.

²⁹ 1540, ss. 1, 2, 10, 11; 1542, s. 4.

³⁰ 1540, s. 3.

³¹ 1540, ss. 10, 11.

³² A tenant in chief was said to hold *ut de corona* if he held by direct grant from the King, and *ut de honore* if he held of the King by virtue of escheat or forfeiture (Challis R. P. 4, 227).

³³ 1540, s. 7; see *Anon.* (1589) 3 Dy. 366b, and cf. *Butler and Baker's Case* (1591) 3 Co. Rep. 25a at 31a, b; see also *Mountague's Case* (1619) Ley 63. A disposition of other land was restrained only if the tenant held land in knights service *ut de corona* at the time when the disposition took effect. Thus if a tenant conveyed all his socage land and subsequently acquired land held in knights service *ut de corona* of which he devised two-thirds, the King had no claim to any of the land held in socage (*Randal's Case* (1558) 2 Dy. 158b; *Worrall v. Harper* (1614) 1 Rolle 65 at 67). Similarly if a tenant disposed *inter vivos* of all his land held in knights service *ut de corona*, he could devise all his land held in socage even if he had made his will before he disposed of the land held in knights service (*Butler and Baker's Case* (1591) 3 Co. Rep. 25a at 35a; *Leonard Lovies's Case* (1613) 10 Co. Rep. 78a at 82b, 84a; *Henry Harpur's Case* (1614) 11 Co. Rep. 23a at 24a; cf. *Worrall v. Harper* (1614) 1 Rolle 65 at 67). But if a tenant in socage who had made a will disposing of all his land subsequently acquired land held in knights service *ut de corona*, on his death his will was effective as to only two-thirds of his socage land (*Leonard Lovies's Case* (1613) 10 Co. Rep. 78a at 83b, 84a: and see *Henry Harpur's Case* (1614) 11 Co. Rep. 23a at 24b).

³⁴ *Sir George Curson's Case* (1607) 6 Co. Rep. 75b at 76a, b; Co. Litt. 76a. But the Statutes gave the King a right to wardship and primer seisin over land disposed of *inter vivos* for the benefit of the tenant's wife or children or for the payment of the tenant's debts (*Sir George Curson's Case* (*supra*) at 76a, b, 77a; *Bacon's Case* (1611) Ley 41; cf. *Myght's Case* (1609) 8 Co. Rep. 163b; *Menfield's Case* (1617) Ley 51; and see *Moody's Case* (1560) 2 Dy. 181a).

land *inter vivos* he could not by his will dispose of more than would, together with the land already conveyed, make up the amount which the Statutes permitted to be devised.³⁵

4. The Statutes applied whether the tenant was seised solely, as co-parcener or as tenant in common,³⁶ but extended only to land held in fee simple.³⁷ The fractions were calculated according to yearly value, not size.³⁸ If the tenant held of more than one lord, the fractions were calculated separately for each lord.³⁹

5. A devise which purported to dispose of more than the permitted amount was valid only *pro tanto*⁴⁰ and the King or other lord could take enough of the land devised to make up his proper fraction.⁴¹ If not more than the proper fraction was devised, it was immaterial that any or all of the fraction left to descend to the heir was entailed,⁴² although if the entail determined, the King or other lord could have the proper fraction made up out of the land devised,⁴³ the devisees having rights of contribution *inter se*.⁴⁴

It is now possible to consider more fully the effect of devises made in the third way. If a testator adopted method (a) and in his will made an appointment of the use by reference to the power given to him by the feoffment, he could dispose of the whole of his land, even if some or all was held in knights service; the appointment took its strength from the feoffment and there was no limit to the amount of land which could be disposed of in this way.⁴⁵ But if the will made no reference to

³⁵ 1540, ss. 4, 7, 10, 11; 1542, ss. 5, 7; *Butler and Baker's Case* (1591) 3 Co. Rep. 25a; *Mountague's Case* (1619) Ley 63 at 65, 66; Co. Litt. 111b.

³⁶ 1542, ss. 4, 5, 7.

³⁷ 1542, s. 3.

³⁸ 1540, ss. 4, 7, 10, 11, 13; 1542, ss. 5, 7, 11, 12; see *Lord Mountjoy and the Earl of Huntingdon's Case* (1583) Godb. 17; *Colthirst v. Delves* (1588) Gould. 84.

³⁹ Thus if the tenant held three manors of three lords, he could not devise two entire manors but only two-thirds of each manor (*The Case of Bankrupts* (1584) 2 Co. Rep. 25a at 25b; *Butler and Baker's Case* (1591) 3 Co. Rep. 25a at 32b).

⁴⁰ 1542, ss. 6, 8; see *Hyde v. Umpton* (1557) 2 Dy. 150b; *Sir Peter Philpot's Case* (1573) 3 Leon. 28; *Digbye's Case* (1596) Moo. K. B. 726; *Sir Richard Pexhall's Case* (1609) 8 Co. Rep. 83b at 85a; *Carsey v. Wood* (1679) T. Raym. 249.

⁴¹ 1540, s. 13; 1542, s. 11. Where there were devises to several persons, the demands of the King or other lord were borne proportionately by each devisee; see *Anon.* (1562) Moo. K. B. 38; *Butler and Baker's Case* (1591) 3 Leon. 271 at 277; and as to dower, see *Bostock and Covert's Case* (1591) 2 Leon. 131.

⁴² 1542, ss. 9, 10; see e.g. *Jerningham v. Cornwallis* (1592) Cro. Eliz. 286.

⁴³ 1542, s. 12.

⁴⁴ 1542, s. 19. The Statutes were passed chiefly for the benefit of the King and other lords and only indirectly for the benefit of the heir; they gave no remedy to the heir if the proper fraction was not left for him: *Butler v. Baker* (1591) Poph. 87 at 90, 91; *Sir Richard Pexhall's Case* (1609) 8 Co. Rep. 83b at 85a.

⁴⁵ *Batley v. Trevillion* (1589) Moo. K. B. 278 at 280; *Mytton v. Lutwich* (1620) W. Jo. 7 at 9; Co. Litt. 111b.

the power, the testator was taken to have adopted method (b) and thus to have devised the fee which resulted to him without invoking the power given by the feoffment.⁴⁶ The statutory limits therefore applied, and so far as the devise exceeded these limits it was void.⁴⁷ There was one case, however, in which failure to refer to the power did not result in the devise falling into category (b), and that was where the testator, before making his will, had disposed *inter vivos* of as much land as the Statutes permitted him to devise. In this case it was clear that any devise which he made would be totally ineffective if method (b) was adopted, and he was therefore taken to have adopted method (a) even though the will made no reference to the power, with the result that the disposition by his will was valid.⁴⁸

It will be seen from this that by the end of the sixteenth century it had been established that, provided the testator took the proper steps during his lifetime and worded his will carefully, it was possible for him to devise land without reference to the Statutes of Wills. There was no need for testators to wait for the resurrection of equitable uses in the form of trusts. Long before these were generally recognized, the construction which the Courts had put on the Statute of Uses had made it possible for the legal estate in land to be devised without restriction. It is no doubt true that technically this power was a mere power of appointment exercisable by will, but for most purposes there is little difference between a devise *stricto sensu* and a testamentary appointment under a general power of property vested in the testator.⁴⁹ It is also true that the Statute made it impossible to devise land by either of the first two methods or by the form (b) of the third, and to this extent it can be

⁴⁶ *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a; 'If your act may work two ways, the one by an interest, the other by an authority, or power, and the act be indifferent, the law will attribute it to the interest and not to the authority' (*Case of Commendams* (*Colt v. Bishop of Coventry and Lichfield*) (1612) Hob. 140 at 159).

⁴⁷ *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a; *Browne v. Taylor* (1626) Cro. Car. 38.

⁴⁸ *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b at 18a, b. 'It would be monstrous in this case to hold, that, where there is a power and an interest, and the act being equivocal, it is doubtful, whether he acted under the one or the other, the Court should adopt that, which would defeat the instrument' (*Cox v. Chamberlain* (1799) 4 Ves. 631 at 637).

⁴⁹ Thus the appointment was of course revocable at any time before the testator died; see *Earl of Ormond's Case* (1617) Hob. 348 at 349; see also Fitz. Abr. tit. Subpena, II, fo. 116b, pl. 23; *Lyte v. Peny* (1541) 1 Dy. 49a at 49b. It was soon settled that the Statutes of Wills, being worded permissively, did not restrict the right to devise given by any custom: *Clarves' Case* (1557) 2 Dy. 155b; *Eve v. Tracy* (1584) 1 And. 146; *Butler and Baker's Case* (1591) 3 Co. Rep. 25a at 35a (argued twenty-one times—see 35b); *Heywood v. Smith* (1611) 1 Bulstr. 162 at 165; and see *Anon.* (1578) 1 Leon. 267.

said that the Statute abolished the power to devise. Nevertheless, where there are four alternative methods of giving effect to a testator's wishes, a Statute which makes three of these ineffective but increases the puissance of the fourth will appear to draftsmen as an enabling rather than a disabling Statute. Far from destroying springing and shifting uses, the Statute of Uses made them effective at law instead of merely in equity: a statute intended to emasculate these uses conferred instead a greater potency on them. It is hardly surprising that a parallel should be found in the power to devise.

CONSENSUS MISTAKE AND IMPOSSIBILITY IN CONTRACT.

H. W. R. WADE.

THE boundary between the fields of mistake and impossibility in contract seems never yet to have been critically surveyed.¹ But such a survey is badly needed, for it is plain that at the moment the law of mistake is in no less a state of confusion than is the law of impossibility or 'frustration'. The outstanding case of recent years, *Bell v. Lever Bros., Ltd.* (1931),² met with such universal and (if it may humbly be said) unmerited hostility from publicists in all quarters that this alone calls for an inquiry into the difficulties of the subject. There has been a disturbing tendency among text-writers, led by Pollock,³ to profess an inability to understand the *ratio decidendi* of the case, to try to limit it for the future to its exact facts, and to refuse to recognize in it any legal principle. It is almost unnecessary to say that no attitude can be more dangerous than this, and that nothing is so certain to cause confusion in the theory and hardship in the application of the law as a set of precedents each of which is narrowly limited to the facts which gave rise to it, and from which no attempt is made to distil any guiding rule of conduct and of law. *Bell v. Lever Bros., Ltd.* is clearly of the first importance as an authority on the law of mistake, and if it is in conflict with earlier theory the earlier theory must go.

The only kind of mistake with which we shall be concerned is that which prevents the parties from coming to an agreement resulting in a binding contract.⁴ This brings us at once to the dividing line between mistake and impossibility, for the latter element becomes relevant only where an agreement has already

¹ But see F. H. Lawson in 52 L. Q. R. 79 for some valuable preparation of the ground.

² [1932] A. C. 161.

³ In a remarkable interdict (Contract, 10th ed., p. 498): 'I will even venture to hope that in the next generation our successors will put it on the shelf as one of those decisions in which it is unsafe to put one's trust as settling any general principle.' Cf. Anson, Contract (18th ed.) p. 147. For yet further disapprobation see 48 L. Q. R. 148 (H. C. G.); and for an attempt to substitute a different *ratio decidendi* see 51 L. Q. R. 650 (P. A. Landon), sufficiently refuted in 53 L. Q. R. 118 (C. J. Hamson). Williston on Contracts, s. 1570, n. 3, is also hostile to the decision. A lone voice of approval is raised in 52 L. Q. R. 27 (T. H. Tylor).

⁴ See the words of Lord Atkin cited immediately below.

resulted in a binding contract. Mistake goes to defeat the *animus contrahendi* of the parties: impossibility goes only to the discharge of obligations created when the *animus contrahendi* has operated. This distinction is fundamental, though several common lines of reasoning which have been applied to each of the subjects have at times obscured it. For instance, the operation of both mistake and impossibility has been ascribed to the presence in the contract of an implied term providing against these contingencies.⁵ This idea has complicated the frustration cases, and there are indications that it is now losing ground.⁶ Corresponding difficulties have resulted from it in mistake, where it is even more out of place, as there can be no talk of implying terms in a contract until there is a contract into which they can be implied. Mistake prevents any consensus or any contract arising, and a rule of construction, such as that governing the implication of terms, can never come into play. In the words of Lord Atkin in *Bell v. Lever Bros., Ltd.*:⁷ 'If mistake operates at all it operates so as to negative or in some cases to nullify consent.'⁸ His lordship, it is true, went on to discuss an implied stipulation 'that the facts should be as understood by both parties', and he referred to it as 'an alternative mode of expressing the result of a mutual mistake'. But it would help clarity of thought if lip-service did not have to be paid to a principle which is so *mal à propos*. The cloudy concept of the implied term is even more incongruous in the law of mistake than it is in the law of impossibility. It should be exorcized from both.

What type of mistake will then defeat consensus? It will be necessary shortly to examine the idea of consensus before this question can be answered.⁹ Much has been written on this, and over it has developed the familiar controversy between the protagonists of the subjective and objective theories. Here—as so frequently elsewhere where two monistic theories conflict—it seems that each contains a large element of truth, but that

⁵ See *Broughton v. Sandilands* (1811) 3 Taunt. 342; Salmond & Winfield, *Contracts*, p. 195.

⁶ The view of Lord Haldane in the *Tamplin Case* [1916] 2 A. C. at pp. 406-7, was adopted by Goddard J. in *Tatem v. Gamboa* [1939] 1 K. B. 132. See the present writer, *The Principle of Impossibility in Contract*, 56 L. Q. R. 519.

⁷ [1932] A. C. at p. 217.

⁸ From the examples then given there does not seem to be any difference between consent which is 'negatived' and that which is 'nullified', except that the former term is preferred for cases of mistake as to the person, the latter where there is error as to the existence of the thing contracted for.

⁹ By consensus is meant the element of agreement, or apparent agreement, which makes a contract binding. This must be distinguished from 'consent', which will be used in a narrower sense.

neither can be made to work without the help of the other. It is here proposed to treat consensus as depending not on one principle but on two, and to state these principles as follows ¹⁰:—

(a) A contract primarily depends for its validity on the intentions of the parties. For a contract, therefore, to be enforceable by the mere fact of agreement, there must be perfect consent by both upon the subject-matter of the contract as therein described. The importance of pure intention can never be removed, and there are cases where the decision has turned solely upon it.¹¹ The Court must of course proceed on factual evidence, but what it is trying to discover and put into effect is the state of mind of the parties.

(b) There is then the principle of estoppel. A contract will often be found where the minds of the parties have not perfectly met, and where the high degree of consent specified in rule (a) will be absent. The contract will therefore not be enforceable by virtue of the consent of the parties. But if the one has given the other reasonable ground for belief that certain facts are true, or that certain promises were made, then the person who induced such beliefs will be held to his statements, and evidence of any intention other than that which reasonably appears from them will not be heard. It is usual to define consensus so as to include the elements of this type of contract. This may be concise and convenient, but it tends to obscure the dichotomy of principles involved. In the argument which follows it will be essential to preserve the distinction between contracts which result from consent and those which result from estoppel, for only then, it is submitted, can a satisfactory doctrine of mistake be evolved.

When the existence of a contract is in question, therefore, we must ask: (a) Was there perfect consent on the terms of the agreement? (b) If not, does a contract result from estoppel?

The field within which mistake can operate is now more clearly definable. For where there is any kind of mistake, whether unilateral or bilateral, or by one party as to the intention of the other, or by both as to the subject-matter of the contract, the perfect subjective consent required by rule (a)

¹⁰ Cf. Hughes in 54 L. Q. R. 370.

¹¹ See Lord Wright's criticism of Williston's 'objective' view: *Legal Essays*, 216.

cannot, by definition, be present. If a contract results, it results from estoppel, not from consent. But it is of the highest importance to observe the limitation of the perfect consent required: it must be consent *on the terms of the agreement or on the subject-matter of the contract as therein described*.¹² The failure to appreciate the significance of this limitation has been the cause of the many difficulties associated with the doctrine that consent will be prevented by a mutual mistake of the parties as to something which 'goes to the root of the contract' or is the 'fundamental basis' upon which the agreement is made. Stated in this form, the doctrine is framed so widely that it embraces truth and untruth in a dangerous way. It seems to have gained a footing in English law in a series of equity cases, and to have been transposed, chiefly by the efforts of writers of text-books, to the common law as it was supposed to exist before *Bell v. Lever Bros., Ltd.* was decided. Lord Westbury said in *Cooper v. Phibbs* (1867)¹³:

'. . . if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded on a common mistake.'

It is at once clear that Lord Westbury was not adverting to any rule of common law by which a contract in which such a mistake was present was void. For he speaks of the contract being liable to be 'set aside', thereby assuming that it is already in existence and that consensus has already been reached. With the rule of equity we have no concern, for it applies only to certain types of contracts, and though of course it now obtains in all Courts, it is outside the scope of this inquiry.¹⁴ But one case has been thought to have engrafted it on the common law. In *Scott v. Coulson* (1903),¹⁵ a case on the sale of a life policy, Vaughan Williams L.J. said:

'If we are to take it that it was common ground that, at the date of the contract for the sale of this policy, both the parties supposed the assured to be alive, it is true that both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the con-

¹² Identity of a contracting party falls within these phrases. See the discussion at the end of this article, especially the penultimate paragraph, for the inclusion of description of identity within the terms of the contract.

¹³ L. R. 2 H. L. at p. 170.

¹⁴ Though the wide rules with which these cases are associated are by no means necessary to the decisions reached. See notes 42 and 43, *post*.

¹⁵ [1903] 2 Ch. at p. 252.

tract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognize as the basis is not true.'

Read in conjunction with the facts to which it applies, there is nothing to question in this statement, except that the explanation it gives is incomplete. The learned Lord Justice did not say that any common mistaken assumption would be ground for the invalidating of a contract at law. For this would be to admit that mistaken motive could vitiate consensus, a proposition the mere statement of which is its own refutation. It was only because the assured was not in fact alive that the contract failed. 'That was a circumstance', said Romer L.J. in his judgment,¹⁶ 'which went to the root of the matter, and rendered it improper to insist upon the completion of the contract.' It is only with the aid of some such limitation as this that a general rule can be derived from *Scott v. Coulson*. How are circumstances which go to the root of the matter to be distinguished from those which do not?¹⁷ The explanation seems to be simpler than most authorities have yet suspected. Speaking of *Scott v. Coulson*, Lord Thankerton said¹⁸:

'As a matter of fact the assured was dead. It was therefore 'clear that the subject-matter of the contract was a policy still current with a surrender value and that accordingly the subject-matter did not exist at the date of the contract.'

Now at last we can dispense with talk of the 'basis' of a contractual assumption or the 'fundamental reason for making a contract'. Lord Atkin expressed his distrust of such expressions, and went on to state his own test for operative mistake. He equated it with that used in a number of the 'frustration' cases, with particular reference to the words of Lord Dunedin in *Metropolitan Water Board v. Dick Kerr* (1918),¹⁹ where he said that 'an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted'. In general terms, adapted to

¹⁶ *Ibid.* at p. 253.

¹⁷ The House of Lords explored the subject in two Scottish cases, *Stewart v. Kennedy* (1890) 15 App. Cas. 75, and *Shankland v. Robinson* [1920] S. C. (H. L.) 103, and approved a passage from Bell's *Principles of the Law of Scotland* classifying types of error which are 'error in substantials'. But as one of them, as is stated by Lord Watson in 15 App. Cas. at p. 121, is error as to 'the quality of the thing engaged for, if expressly or tacitly essential', there is little help in the passage.

¹⁸ In *Bell v. Lever Bros., Ltd.* [1932] A. C. at p. 236.

¹⁹ [1918] A. C. at p. 128. Lord Atkin's reference is at [1932] A. C. p. 226.

either mistake or impossibility, the question, according to Lord Atkin, is: '*does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?*'²⁰ 'The identity of the subject-matter' is not a self-explanatory phrase, but Lord Atkin's reference to *Krell v. Henry* (1903)²¹ seems to make his position clear:

'The subject of the contract was "rooms to view the procession"; the postponement, therefore, made the rooms not rooms to view the procession.'

This conception of identity admits of only one explanation, for taking the word in its normal sense it might be thought strange that there should be found a difference in the identity of the rooms simply because of the postponement of the procession. The rooms were still the same rooms; but they were not the entity which had formed the subject-matter of the contract, for they had lost one of the attributes which the contract required that its subject-matter should have. The conclusion, therefore, is: all points which are within the contract as agreed by the parties are part of the subject-matter of the contract, and all points which are outside of it go at most to motive and are irrelevant. If parties intend their agreement to depend for its validity on any one fact, they must state it in the contract. For it is of course only within the boundaries of the bargain which they make between themselves that their intention can be operative. The question is therefore not what is *behind* or *beyond* or *at the root of* the contract, but what is *in* the contract. All else, however important it may be to the parties, is of no interest to the Court. The distinction is between what they ask for and why they ask for it.²²

Thus the interest of clear thinking would be advanced if such expressions as 'fundamental assumptions', 'matters going to the root of the contract', '*error in substantia*' or 'collateral error' were discarded, and if the type of mistake in question were referred to as 'mistake within the terms of the contract' simply. Perhaps the best way of applying the test for this is to ask: did each party get what he bargained for? If either did not, as the result of a common error between the parties, then there must have been mistake within the terms of the contract. Conversely, if each party gets what he bargains for, there can be no mistake.

²⁰ [1932] A. C. at p. 227.

²¹ [1903] 2 K. B. 740.

²² See Holmes, *The Common Law*, pp. 314-5: 'If there is a mistake as to a fact not mentioned in the contract, it goes only to the motives for making the contract.'

There could be no better illustration of the rule than the decision in *Bell v. Lever Bros., Ltd.* itself.²³ By a majority of three to two the House of Lords held that there had been no operative mistake, though Wright J. at first instance and the Court of Appeal unanimously had taken the opposite view, basing their decision on the supposed rule of the common mistaken assumption — ‘the underlying assumption without which the parties would not have made the contract as they did’.²⁴ Had it not been for this supposed rule the issue could hardly have been in doubt. For the fact that Levers mistakenly thought that the service agreements could best be terminated by payment of the money in question could be nothing more than their motive for making the composition with the appellants. Nothing in the contract referred to any assumption that Levers could not revoke the agreements in some other way if they preferred. From their point of view, they simply chose the less advantageous method of cancelling the agreements, and mistakenly made a bad bargain; and it is axiomatic that those who make bad bargains, purely upon their own mistaken assumptions of fact, cannot claim relief from them.²⁵ What the two parties contracted to do was perfectly possible, and the fact that the contract was put into execution exactly according to its terms is the best proof that there can have been no mistake within those terms. Thus Lord Atkin said ²⁶:

‘The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for.’

This principle, as the test of operative mistake, is not a novel one, but existed before the equitable practice of setting

²³ Messrs. Levers had paid sums totalling £50,000 to the two appellants as compensation for terminating their services as chairman and vice-chairman of the directors of one of Levers' subsidiary companies. Levers then discovered that the appellants, while in their employment, had been guilty of breaches of duty for which their service agreements might have been summarily determined without notice or compensation. There was found to be no fraud in the appellants.

²⁴ [1931] 1 K. B. at p. 564. And Lord Wright, in *Legal Essays*, 214, says: ‘I think the decision turned on what in all such cases is the real problem, whether the mistake was sufficiently basic.’ These last two words are, with all deference, typical of the traditional terminology from which so much confusion has resulted.

²⁵ An American case, *Wood v. Boynton* (1885) 54 Am. Rep. 610 is a good illustration. There the plaintiff showed to the defendant a stone, saying that she had been told it was a topaz, and the defendant, who was a jeweller, offered her a dollar for it. Some time later she accepted. The stone turned out to be a rough diamond, worth about \$700. Taylor J. said: ‘If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain.’ See also the dissenting judgment of Sherwood J. in *Sherwood v. Walker* (1887) 11 Am. St. Rep. 581, which embodies these principles.

²⁶ [1932] A. C. at pp. 223-4.

contracts aside on the ground of common mistake had been confused with the rules of law as to consensus. In *Taylor v. Hare* (1805)²⁷ the plaintiff failed, on the ground that he had got what he bargained for, to recover moneys paid for a patent which turned out to be worthless. It appears from the facts that, although the plaintiff's counsel contended that the patent was 'void', it was in fact valid and operative until repealed, and it had not been repealed when the plaintiff brought suit. Thus there is a close resemblance to the facts in *Bell v. Lever Bros., Ltd.*, where the service agreements were valid and had not been revoked at the time of the claim. Sir James Mansfield C.J. said²⁸:

'In this case two persons equally innocent make a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent-right, and the plaintiff supposing the same thing.'

If ever there was a case for the application of the rule as to common mistake going to the root of the contract, had any such rule existed, this was surely it. But the Chief Justice proceeded:

'Under these circumstances the latter agrees to pay the former for the use of the invention, and he has the use of it; . . . How then can we say that the plaintiff ought to recover back all that he has paid?'

Chambre J. said²⁹:

'The plaintiff has had the enjoyment of what he stipulated for, and in this action the Court ought not to interfere, unless there be something *ex aequo et bono* which shows that the defendant ought to refund. Here the parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own invention; not so the plaintiff, for he has had the use of another person's invention for his money.'³⁰

In *Lamert v. Heath* (1846),³¹ where there had been a sale

²⁷ 1 B. & P. N. R. 260. The defendant, who had obtained a patent for an invention which he supposed to be his own, granted the use of it, during the currency of the patent, to the plaintiff, payment to be by an annual sum secured by bond. This sum was paid for several years, until the plaintiff discovered that the invention was not the defendant's, but had been in public use before the patent had been obtained. The patent, however, had never been repealed.

²⁸ *Ibid.* at p. 262.

²⁹ *Ibid.* at pp. 262-3.

³⁰ Cf. *Chanter v. Dewhurst* (1844). 12 M. & W. 823, and *Lawes v. Purser* (1856) 6 E. & B. 930.

³¹ 15 M. & W. 486. The defendant, a share broker, bought for the plaintiff scrip certificates which were on the market as 'Kentish Coast Railway scrip' and were signed by the secretary of the company. Later the directors repudiated the scrip, as having been issued by the secretary without authority. The plaintiff thereupon sued for the price he had paid.

of 'Kentish Coast Railway scrip', it was obviously assumed by both parties to the sale that the scrip was the real scrip of the company, and such an assumption would, in the apparent meaning of the words, be 'fundamental to the formation of the contract'. Yet Alderson B. said³²:

'The question is simply this—was what the parties bought in the market "Kentish Coast Railway scrip"? It appears that it was signed by the secretary of the company; and if this was the only Kentish Coast Railway scrip in the market, as appears to have been the case, and the one person chooses to sell and the other to buy that, then the latter has got all that he contracted to buy.'³³

In other words, where the plaintiff receives what the contract shows him to have asked for, there is no room for mistake.

The same principle appears in the well-known case of *Kennedy v. Panama, etc. Mail Co.* (1867).³⁴ Blackburn J. in his judgment spoke in terms of rescission, but the case has consistently been treated as one of mistake,³⁵ as the point canvassed was whether the plaintiff really received something different from what he asked for, and whether there was a warranty by the company that a certain contract between the company and a third party was in operation. The learned judge said³⁶:

'It was, by implication, stated that the contract was binding, and this was a mis-statement, though an innocent one; but we do not think that it affected the substance of the matter, for the applicant actually got shares in the very company for shares in which he had applied; and that company had, by means of the invalid contract, got the

³² *Ibid.* at p. 488.

³³ Contrast *Young v. Cole* (1837) 3 Bing. N. C. 724, where bonds sold as 'Guatemala bonds' were held to have been offered as 'real Guatemala bonds, such as were saleable on the stock exchange' (*per* Tindal C.J. at p. 730). He said: 'It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value.' Bosanquet J. said: 'The bonds he delivered to the plaintiff were not Guatemala bonds, but, on the stock exchange, worthless paper.'

³⁴ L. R. 2 Q. B. at p. 589. The defendant company, who carried mails under contract with the Government of New Zealand, issued a prospectus of new shares to enable it to perform 'the contract recently entered into with the Government of New Zealand' for additional mail services. In fact the contract referred to had not been concluded, though both parties honestly and reasonably believed that it had. The plaintiff had taken shares on the faith of the prospectus, and sued to recover the instalments he had paid. The company brought a cross-action for a call on the shares.

³⁵ For at that time the Court could not have rescinded the contract on grounds of innocent misrepresentation, and the plaintiff had to prove absence of consensus. This is no longer law since the Judicature Acts: see Scrutton L.J. in [1931] 1 K. B. at p. 588.

³⁶ L. R. 2 Q. B. at p. 589.

benefit, and is now carrying the mails on terms, not the same as those they supposed, and perhaps not so profitable, but still on profitable terms. . . . We think there was a misapprehension as to that which was a material part of the motive inducing the applicant to ask for the shares, but not preventing the shares from being in substance those he applied for.'³⁷

The decision in *Bell v. Lever Bros., Ltd.* embodies the correct and indeed necessary consequence of this line of cases.

We have now to examine the position which arises where the parties are under a common error as to something which is within the terms of the contract, and here we must observe carefully where the law of mistake passes into that of impossibility. Mistake can operate only to defeat consensus, and therefore, according to the principles of consensus stated above, its result will be that the minds of the parties do not meet on the defined subject-matter of the contract. At the same time, there must be nothing in the nature of an estoppel, which will allow a contract to arise although the minds of the parties have not perfectly met, as in cases of unilateral mistake. If these conclusions are accepted, it follows that all cases of mistake by both parties as to some fact within the terms of the contract should be treated as cases of impossibility. For there is no doubt, as the contract itself must show, that the parties reached agreement between themselves. The error in the transaction did not hold their minds apart, for they both shared it, and were both in precisely similar states of mind. But they agreed on subject-matter which turned out to be otherwise than they had supposed. By force of their agreement a contract arises. But the question is: can it be performed? Can each get what he bargains for? For instance, in *Galloway v. Galloway* (1914),³⁸ traditionally a case of mistake, Ridley J. based his judgment on the familiar purported rule as to a common error 'material to the existence' of the agreement. But, as a learned writer has said of this judgment,³⁹

³⁷ Pollock (Contract, p. 498) tries to distinguish *Bell v. Lever Bros. Ltd.* in this respect, and talks of 'the imaginary claim to compensation' being 'surely of no value in law'. But of course the claim, so far from being imaginary, was based on a valid service agreement, and the mistake of the company as to its value was just like that in *Wood v. Boynton*, note 25 above.

³⁸ 30 T. L. R. 581. The plaintiff and defendant, believing (as was not the fact) that they were lawfully married, had entered into a deed of separation. The case is scantily reported, but it is clear that there was mention in the deed of the supposed fact that the parties were husband and wife, for one of the contentions of counsel for the respondents was that the recitals in the deed raised an estoppel against the party alleging the invalidity of the marriage.

³⁹ F. H. Lawson, 52 L. Q. R. at p. 86.

‘This is *error in causa* with a vengeance, and apparently in the view of Ridley J. the mutual mistake of fact need only be *material* to the existence of the agreement. In reality, there was no need to investigate the intention or the knowledge of the parties. An agreement which, on the face of it, purported to create a voluntary separation between husband and wife could not operate between parties who were not married. It was a legal impossibility.’

Where, therefore, parties agree upon certain subject-matter, but share a common error which makes it different from what they have specified in the contract, then it is impossible for the contract to be performed according to its terms. If, hearing that X has died and left me a piece of Dresden china, I agree to sell you ‘the piece of Dresden china left to me by X’, and it turns out that the china is not Dresden china, then I cannot deliver what I have promised, and, unless there is anything to show that I have assumed the risk or given any kind of warranty, my obligation will be discharged by impossibility. If, in *Bell v. Lever Bros., Ltd.* the service agreements had for any reason been void, and not, as they were, merely voidable, the same principle would have applied. It is impossible to release another from obligations under a non-existent contract.⁴⁰

Cases such as these, and such as those mentioned in the next paragraph, can perfectly well continue to be called cases of mistake and yet be treated on the principles which have been shown really to be those of impossibility. But the change of name here advocated is one which seems essential for a clear appreciation of the respective fields of these two distinct branches of the law.⁴¹ Each calls for the same test to be applied, which is the inquiry into what exactly is the subject-matter of the contract. But for mistake the further question is: did the minds of the parties meet upon this? For impossibility it is: can the parties, having agreed, give effect to their agreement according to its terms?

All cases, therefore, where the mistake of the parties relates to the existence or nature of the subject-matter, and not to each other’s intentions, should not be considered cases of mistake—though these will be found to be the most numerous in the

⁴⁰ See also *Gompertz v. Bartlett* (1853) 2 E. & B. 849 and *Gurney v. Womersley* (1854) 4 E. & B. 133. In neither of these cases could the thing promised (in each case a specific bill) have been delivered as described to the offeree.

⁴¹ It has commended itself to a number of authorities: see Anson, *Contract* (18th ed.) p. 144; Lawson, 52 L. Q. R. at pp. 84–5; Lord Atkin in [1932] A. C. at pp. 218 (on *Cooper v. Phibbs*) and 222 (on *Smith v. Hughes*).

chapters of the books assigned to this topic. The equity cases, were it necessary to reconcile them with common law rules, are almost without exception of this type. For they concern either the sale of a non-existent thing⁴² or else the purported purchase by a person of his own property⁴³—both, clearly enough, impossible acts. Of the common law cases of this type *Couturier v. Hastie* (1856)⁴⁴ is the most prominent. *Scott v. Coulson*, already considered,⁴⁵ was in effect a common law case, and the substance of the decision had already been stated by a common law Court in *Strickland v. Turner* (1852).⁴⁶

The converse of this may seem to involve a fine, if not an unreasonably fine, distinction. Suppose that two parties, wrongly believing that they are husband and wife, make a separation agreement in which they simply refer to each other by name, without mention of any marital relationship, there is nothing then in the agreement to make its performance impossible. Each would have acted from mistaken motive, and the contract would have to stand, there being no error as to anything within its terms. But in fact it is almost inconceivable that parties would enter into a separation agreement which did not specify their supposed conjugal tie, and the principle that a contract must among its terms make mention (expressly or impliedly) of any fact on which it is to depend for its validity still seems to be sound. The case imagined corresponds with 'a somewhat extreme case' put by Holmes in discussing misrepresentation within and without a contract⁴⁷:

'A says to B, I have not opened these barrels myself, but they contain No. 1 mackerel: I paid so much for them to so and so, naming a well-known dealer. Afterwards A writes B, I will sell the barrels which you saw, and their contents, for so much; and B accepts. The barrels turn out to contain salt. I suppose the contract would be binding if the statements touching the contents were honest, and voidable if they were fraudulent.'

If B accepts on these terms he cannot complain, for he gets all that was offered to him. Nothing, of course, could be more

⁴² *E.g. Kennedy v. Thomassen* [1929] 1 Ch. 426 (adopting, in an alternative *ratio decidendi*, *Strickland v. Turner* (1852) 7 Ex. 208). *Scott v. Coulson* was in effect a common law case—see p. 4 above.

⁴³ *E.g. Bingham v. Bingham* (1748) 1 Ves. Sen. 126; *Cochrane v. Willis* (1865) L. R. 1 Ch. 58; *Cooper v. Phibbs* (1867) L. R. 2 H. L. 149.

⁴⁴ The contract was for the sale of a cargo of corn which had in fact been spoiled and disposed of before the date of the agreement, making performance impossible.

⁴⁵ P. 364 above.

⁴⁶ Note 42 above.

⁴⁷ *The Common Law*, pp. 323-4.

unbusinesslike than this form of bargain if B intended the presence of mackerel in the barrels to be 'fundamental to' or 'at the root of' his purchase.

These rules have been set out as it is conceived that they exist. It may well be that in some cases they should be relaxed, for there is no rule so well framed that it cannot, strictly applied, in a certain set of facts appear to work injustice. But if there is to be modification, it should come through the recognition of the limits of the present rules, and the introduction of some new and accurately defined exception to them. Nothing can be less satisfactory than an attempt to reach the same end by blurring the boundaries of the pre-existing law, and restating it in so vague a form as—in our case—to admit mistake motive as a ground for impugning a contract.

What then is the real field of mistake in contract? It is where, to repeat our previous conclusion, there is (a) no perfect consent by the parties on the subject-matter specified in the contract, and (b) no operation of the principle of estoppel. Where the conduct of either of the parties induces a mistaken belief in the other, or where the one puts an unreasonable, though possible, interpretation on words or acts of the other, the case will fall under (b), and, as has been well said in connection with the rule in *Smith v. Hughes* (1871),⁴⁸ the results of the mistake can be exhibited only in a system of cross-estoppels.⁴⁹ But where the mistake of each party is his own, or results from a reasonable interpretation of a reasonably worded offer, there may be mistake which will hold the minds of the parties apart, and still there will be no estoppel. *Raffles v. Wichelhaus* (1864)⁵⁰ is the classic case. There it was reasonable for the offeror to expect the offer to be understood as he understood it, as he had no reason to know of the ambiguity in the words 'ex Peerless from Bombay'. Precisely the same was true of the offeree, and, as the agreement was not perfect, there was no contract.

But pure meeting of the minds is not enough. They must meet upon the subject-matter of the contract. To take an improbable example, suppose that A is an absentee landlord, and hears from his agent that he has acquired two fields, Blackacre and Whiteacre, of which Blackacre, as he is told, adjoins B's land. In fact it is Whiteacre which is in this position, and not Blackacre. A says to B: 'Will you buy Blackacre?'

⁴⁸ L. R. 6 Q. B. 597.

⁴⁹ *Hughes* in 54 L. Q. R. 372.

⁵⁰ 2 H. & C. 906.

and B agrees, having himself also reasonable ground for thinking that it is the field adjoining his land. Here the minds of the parties have obviously met, for they have agreed to sell 'Blackacre', and the literal performance of the bargain would be perfectly possible. Nor is there estoppel, for the assumptions of each are reasonable, and neither has in any way induced the error in the other. But their minds did not meet on what they purported to sell, for their consent was consent as to Whiteacre (of which each was thinking), and neither for a moment thought of the field which was in fact Blackacre. Thus there is no consensus in such a case, and no contract can be born.

Something must be said of the mistaken personality cases, and of how they fit in with the rules already explained. Impersonation, which is the commonest cause of this kind of mistake, involves fraud; and in most of the cases one of two innocent parties has to suffer from the dishonesty of a third (who is generally not a party to the final action), and the result is a hardship to one of them whichever way the decision goes. But for our present purposes it is clear that where there is impersonation, or any mistake by either party as to the identity of the other, there will be no consensus. If X intends to deal with Y, and in fact deals with Z, then there has not been the perfect subjective consent which we require. Nor, if X acts reasonably, can there be estoppel. But the difficulty, of course, is in the word 'identity'. There are many different indicia of identity on which a contracting party may rely, and it may be desperately difficult to discover his real state of mind. Pothier's broad rule, which has found favour with English judges, is well known. It states simply that where considerations of personality enter 'as an element into the contract' which the mistaken party desires to make, then there is no contract; but that where he would have been willing to contract with any person whatever, then the contract stands.⁵¹ This opinion, though adequate to the purposes for which it has been cited, goes too far at least for English law. For there may be cases where, though one of the parties would have been willing to contract with anybody, yet in fact he dealt with a particular person under such a misapprehension that there could be no consensus. If A, desiring certain goods, writes to B an order for them, and the order is received by C, who has taken

⁵¹ Pothier, *Traité des Obligations*, s. 19, referred to by Fry J. in *Smith v. Wheatcroft* (1878) 9 Ch. D. at p. 230, and by other judges in a number of later cases.

over B's business, then C cannot avail himself of the offer; and it is immaterial that A would have been perfectly willing to contract with C.⁵² We can therefore modify Pothier's rule in this way: if the indicia of personality which are wrongly apprehended are those same indicia which the mistaken party has used to describe, for himself, the identity of the other party, then there is no contract—despite the fact that the mistaken party would have contracted with any one. But if (and in this we agree with Pothier) there is error as to elements of personality other than those used by the one party to describe, for himself, the other, this is immaterial. We are back at the original inquiry into what are the terms of the purported contract. If A sends by post a written offer to B, his only means of identifying B is B's name and address. These therefore define, for the purposes of the contract, the identity of one of the parties; and mistakes here will defeat consensus.⁵³ But if A and B are face to face A may have much more important indicia of B's identity than his name; and if A is willing to contract with any one who stands before him, then clearly he is not only willing, but also intends, to contract with B. For 'B' is only the person with whom A intends to contract, and the symbol is not necessarily used for a name.⁵⁴ For this reason there seems also to be a danger of inaccuracy in one of the propositions from the American case *Edmunds v. Merchants*

⁵² See *Boulton v. Jones* (1857) 2 H. & N. 564. There A had a special interest in contracting with B, as he wished to plead a set-off against B. But Pollock C.B. stated the general rule that 'if a person intends to contract with A, B cannot give himself a right under it' (at p. 565), and this was the construction put upon the case by Cockburn C.J. in *British Waggon Co. v. Led* (1880) 5 Q. B. D. at p. 152.

⁵³ Thus in *Cundy v. Lindsay* (1878) 3 App. Cas. 459, one of the clearest cases, B induced L to think that he was 'Blenkiron & Co., 37 Wood Street, Cheapside'. No such firm as that existed at that address, so the indicia of identity were self-contradictory. Therefore between B and L there was 'no consensus of mind which could lead to any agreement or any contract whatever' (Lord Cairns L.C. at p. 465). Contrast *King's Norton Metal Co. v. Edridge* (1897) 14 T. L. R. 98, where W represented himself as a fictitious firm, H. & Co., and ordered goods by post from the plaintiffs. A. L. Smith L.J. held that the supposed firm was no part of the indicia of identity of W, as the plaintiffs clearly intended to contract with the writer of the letters. In *Cundy v. Lindsay* L had intended to contract with a specific firm, which had in fact a different address to that which L made reference. In the *King's Norton Case* the alleged firm did not apparently influence the plaintiff's conception of W's identity, but merely induced him to place confidence in the writer of the letters. But this is hardly an adequate explanation on the facts as reported. Even if the plaintiffs intended to contract with the writer of the letters, they in fact purported to contract with H. & Co., a non-existent entity. Who then were the parties as specified in the contract?

⁵⁴ But *quare*, whether it is not necessarily so used where the contract is committed to writing, even though the parties are face to face. They will be unable to go behind the written document, and the contract must stand or fall by the written descriptions of the identities of the parties. If these are false, no agreement can be construed out of the document. This is the same difficulty as that in the *King's Norton Case*.

Despatch Transportation Co. (1883),⁵⁵ which was relied on by Horridge J. in *Phillips v. Brooks* (1919).⁵⁶ The proposition is:

‘If A, fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A.’

This implies that there can be no mistake of person in such circumstances. But if A enters B’s shop and, stating that he is C, a reputable merchant, asks B to sell him goods on credit, and if B, on the faith of C’s reputation, gives him the goods and the credit, then there is surely no doubt that the person with whom B intends to contract has as one of his characteristics the name and reputation of C. Now these go to his identity, not merely to his character.⁵⁷ There cannot be consensus in such a case.

The other proposition quoted by Horridge J. seems hardly more exact:

‘If A, representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A.’

Would this be true if A bought for cash, and paid for the goods at the time of the sale? Surely in this case it would not matter if he said that he were (to borrow a favourite expression of Dr. Johnson’s) the Cham of Tartary. But in the obvious sense for which the proposition is used, where the misrepresentation as to identity has caused the other party to conclude the deal, the proposition is sound enough; and it embodies in skeleton form the facts and result in *Lake v. Simmons* (1927),⁵⁸ where the impostor represented herself as the wife of X, and as buying for him.⁵⁹

⁵⁵ 135 Mass. 283 (headnote).

⁵⁶ [1919] 2 K. B. at p. 246.

⁵⁷ *Aliter*, probably, where the name given is imaginary and the contract is oral. Lord Sumner’s ‘confidence trick man, posing as a benevolent millionaire from the United States’ ([1927] A. C. at p. 506) might surely use his confidence trick purely as an inducement to contract, and not as part of his identity. If he used a purely imaginary name the indicia of identity on which the other party relied would not include this.

⁵⁸ [1927] A. C. 487. The issue was whether goods had been ‘entrusted’ to a person within the meaning of an exceptions clause in a Lloyd’s policy of insurance against theft. But the consent necessary for entrusting was held the same as for contract.

⁵⁹ There are difficulties where A, acting for B, buys from C, whom he knows to be unwilling to sell to B. In *Nash v. Dix* (1898) 78 L. T. 445, C refused an offer from B, but accepted a less favourable one from A. A had been induced to buy by B, who undertook to buy from him at a stated profit. North J. decreed specific performance, finding that A bought not as agent of B, but for himself with a view to re-sale to B. Would the result have been different if A had been B’s agent? Where the principal is undisclosed the contract is good against the agent, and there is no question of mistaken identity. Yet in *Said v. Butt* [1920] 3 K. B.

So for the personality cases the question 'what are the terms of the contract?' or 'what is the description of the subject-matter?' becomes 'who are the contracting parties?' or 'how are they described by each other?' The problem of identity, which we have already discussed for subject-matter, is the same for personality, though with this difference: that where there is mistake from description of the subject-matter consensus may be (and generally is) reached, and the question then becomes one of impossibility; but where the mistake is of personal identity there can be no meeting of the minds of the specified parties, and there cannot even be agreement. The difficulty is in both cases equally the inspection of the minds of the parties, and the determination of what is *in* the contract. Questions of personality perhaps present this problem in its most acute form.

Some of these principles were, it is respectfully submitted, incorrectly handled by Tucker J. in his judgment in *Sowler v. Potter* (1939).⁶⁰ Mrs. R had in May been convicted of permitting disorderly conduct in a tea-room. In June she wrote to S's agent and, using the false name of P, offered to take a lease of S's restaurant premises. In July, by deed poll, she assumed the name P—the same name which she had falsely used earlier. In August a lease was executed, as between P and S, and P went into possession. S then discovered P's earlier record, and sued, amongst other things, for a declaration that the lease was void. Tucker J. granted this on the ground of mistaken identity. S's agent was aware, he said, that there was in existence a Mrs. R, a convicted person, and he thought that when he entered into this contract with P he was entering into a contract with some person other than the Mrs. R. who had been convicted. She had changed her name with the intention of deceiving the plaintiff, and had therefore fraudulently misrepresented her identity. But the learned judge said further: 'I think that in this case there was such a mistake as to render this lease void *ab initio*.' But was there really any mistake as to identity? Mrs. P, for S's purposes, was identified by her name and address, and these, when the

497, McCardie J. said of such a case, 'the personal element was here strikingly present'. A had bought from C a ticket for the first performance of a play, acting as agent for B, the *persona non grata*. Despite the emphasis placed by the learned judge on the almost private nature of a first performance, it is notorious that theatre tickets are transferable. There is no rational distinction between an agent and one who acts for himself, though with a view to immediate re-sale to a certain individual. But the law as to undisclosed principals is in any case anomalous, and *Said v. Butt*, if followed, may represent a special rule.

⁶⁰ [1939] 4 All E. R. 478.

lease was executed, were exactly what they were stated to be. That S, had she known all the facts, would not have been willing to lease the premises to P is no more relevant to the consent than was the fact that, in *Bell v. Lever Bros, Ltd.*, Messrs. Levers would not have been willing, had they known of their employees' frauds, to make the compensation agreements.⁶¹ Also, as in *Bell v. Lever Bros., Ltd.*, the agreement was put into execution exactly according to its terms; and we may repeat again that where this is possible there is no room for mistake.

⁶¹ As the lease was induced by what the learned judge found to be a fraudulent change of name it was of course voidable at the instance of the party deceived (*Gordon v. Street* [1899] 2 Q. B. 641). But the suggestion there made (by A. L. Smith L.J.) that the contract might be void *ab initio* does not support the use made of it by Tucker J. at p. 481. In *Gordon v. Street* the fraudulent party used a fictitious name (as the learned Lord Justice assumed), and as the contract seems to have been made through the post there might have been a mistake of identity, though the case was not concerned with this point.

THE EFFECTS OF PEACE TREATIES UPON PRIVATE RIGHTS.¹

ARNOLD D. McNAIR.

THE aim of this article is to consider and state the effects upon private rights of treaties of peace, or, more precisely, of some of the normal contents of treaties of peace. We are not concerned with the automatic consequences of the coming into force of a treaty of peace, namely, the cessation of the operation of the many rules of law which affect the nationals and residents of a country upon its passing from a state of war into a state of peace.

We shall deal with the following topics:—

A.—Summary of public international law.

B.—Territorial changes.

C.—Change in nationality—plebiscite—options.

D.—Change in domicile?

E.—The scope of the power of a State to affect the private rights of its nationals.

F.—Effect upon nationals of third States.

G.—How far a peace treaty concluded by the British Crown involves legislation.

H.—The relation of the British Crown to its subjects in regard to a peace treaty.

A.—SUMMARY OF PUBLIC INTERNATIONAL LAW.

It will be convenient to begin by stating in summary form the general effects resulting from the coming into force² of a treaty of peace apart from any special stipulations which it may contain. Hostilities cease, if indeed they have not already ceased as the result of a general armistice. Pre-war rights of action which have been in suspense during the war revive. Rights under any pre-war contracts forming an exception to

¹ The following abbreviations will be used:

Annual Digest = Annual Digest of Public International Law Cases
(seven volumes covering the period 1919 to 1934
inclusive, with more to follow).

Oppenheim = International Law, vols. i (5th ed) and ii (6th ed.) (by
Lauterpacht).

² This usually happens upon ratification by all the belligerents, but the treaty may contain a contrary stipulation, *e.g.* the concluding paragraphs of the Treaty of Versailles of 1919.

the general rule of abrogation of contracts which 'cross the line of war' revive. Normal peaceful intercourse is resumed, and usually diplomatic intercourse and the mutual exercise of consular functions begin once more. Enemy nationals who have been interned are released and in many cases are compulsorily repatriated. Prisoners of war are repatriated as soon as possible. There is an amnesty as between each belligerent on the one hand and its opponent and that opponent's nationals on the other for all wrongful acts committed during the war and incidental to the war, but not of course for other wrongful acts, *e.g.* murder or larceny committed by a prisoner of war. What are sometimes called 'war crimes' by individuals can no longer be punished, and 'war criminals' must be released—at any rate if they have not yet been convicted.³ Enemy private property which has not been confiscated but merely taken into custody or laid under embargo will be restored. Merchant ships and cargoes which have been formally condemned by a Prize Court are not restored to their former owners, and (though the matter is not free from controversy) merchant ships and cargoes may be the subject of proceedings in prize even after the conclusion of peace, provided the incriminating acts were completed before that time.

Many private rights depend upon the existence of treaties. The effect of peace upon pre-war treaties between the belligerents is closely connected with the effect of the outbreak of war upon those treaties.⁴ The fact that the future treaty relations between the parties are now usually dealt with by the treaty of peace makes it difficult to state a general rule of law. But if a generalization is to be hazarded, it would be that—apart from express stipulation in the treaty of peace—treaties which were abrogated by the outbreak of war, for instance, political treaties, do not revive, and that treaties merely suspended resume their operation. It should be added that many permanent rights of individuals, particularly those connected with property or status, arising from treaties, are not affected by the outbreak of war between the parties to those treaties; in these cases the treaty had already taken effect by creating the private rights, and it is unnecessary to inquire what the effect of the war or the peace on the treaty may be.

It is hardly necessary to state that most of the matters

³ See generally on the matter, Oppenheim, vol. ii, §§ 257, 272—284, and p. 477, note 2.

⁴ Upon the whole subject, see Oppenheim, ii, § 99, and McNair, *Law of Treaties*, ch. 44.

referred to in this section are regulated in detail by a modern treaty of peace.

B.—TERRITORIAL CHANGES.

International law recognizes two distinct kinds of interest in regard to immovable property—the *imperium* or sovereignty which belongs to the State, and the *dominium* or property which belongs to the individual, or frequently to the State in its capacity as landowner; for instance, Crown land in England. It is believed that most municipal legal systems reflect this distinction. It is therefore necessary to inquire which of these interests is affected by a treaty of cession, and the answer is that *prima facie* what a State transfers when it cedes territory by a treaty of peace (or a treaty of cession based on some other motive such as sale or exchange), is *imperium*, not *dominium*. Nevertheless a State may by express terms cede both *imperium* and *dominium*, and there is at any rate one case on record where a State ceded *dominium* without ceding *imperium*; by Articles 45 to 50 of the Treaty of Versailles (with their Annex) Germany ceded to France ‘in full and absolute possession, with exclusive rights of exploitation, unencumbered and free from all debts and charges of any kind, the coal mines situated in the Saar Basin as defined in Article 48’.⁵ What Germany ceded was *dominium*, taking it away in the few cases where it was privately owned, from the owners of the coal mines, and the Annex provided that if eventually, as the result of a plebiscite, the Saar Basin was returned to Germany, she would have to buy back the coal mines from France. As to the *imperium*, ‘Germany renounced in favour of the League of Nations, in the capacity of trustees, the government of the territory defined above’ (Article 49), and until the reunion with Germany the *imperium* was probably either in suspense or distributed in various hands.

English decisions.

The English authority is scanty and somewhat unsatisfactory.⁶ I think that it can fairly be summarized by saying that cession does not *per se* affect private property, immovable

⁵ By s. 1 of the Annex the deposits of coal, together with plant, equipment, etc., became ‘the complete and absolute property of the French State’.

⁶ *Nabob of the Carnatic v. East India Company* (1791) 1 Ves. Jun. 371; (1793) 2 Ves. Jun. 56; *Secretary of State for India v. Kamachee Boye Sahaba* (1859) 13 Moo. P. C. 22; *Doss v. Secretary of State for India* (1875) L. R. 19 Eq. 509; *Cook v. Sprigg* [1899] A. C. 572; *West Rand Central Gold Mining Co. v. R.* [1905] 2 K. B. 391. For the ‘act of State’ aspect, see *infra*, p. 396.

and movable, within the ceded territory, and that the State acquiring the territory *ought* not to act to the detriment of the owners of that property; but, if the British Crown upon acquiring territory by cession were so to act, its action would be an 'act of State' and no municipal tribunal would be capable of dealing with the matter. Lord Halsbury L.C. in delivering the opinion of the Privy Council in *Cook v. Sprigg* said⁷:—

'It is no answer to say that by the ordinary principles of international law private property' [certain concessions of rights in regard to land] 'is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has power to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.'

American decisions.

The American authority is clear. In *United States v. Soulard*,⁸ arising out of the cession of Louisiana, Chief Justice Marshall said:—

'In the treaty . . . the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract. The term "property", as applied to lands, comprehends every species of title inchoate or complete . . .'

In *United States v. Percheman*⁹ the same learned Chief Justice had to consider the effect of the cession of Florida by Spain to the United States by treaty in 1819. Although the

⁷ [1899] A. C. 572, 578.

⁸ (1830) 4 Peters' Reports, 511.

⁹ (1833) 7 Peters' Reports 51; see also *Ely's Administrator v. United States*, 171 U. S. 220, 223. Abundant American authority will be found in Moore, *Digest of International Law*, § 99. And see Sayre in *American Journal of International Law*, xii (1918) pp. 475—497.

treaty contained stipulations relating to the titles to lands in the ceded territory, his remarks upon the general rules governing cession are valuable in view of the great authority attaching to his judgments. He said:—

‘It is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede . . .’

This doctrine was approved by the Transvaal Concessions Commission¹⁰ in 1901, and Chief Justice Marshall was cited. The Commissioners stated that they were ‘unable to perceive any sound distinction between a case where a State acquires part of another State by cession and a case where it acquires the whole by annexation’.

Permanent Court of International Justice.

In the case of the *German Settlers in Poland*¹¹ in 1923 the Permanent Court gave an Advisory Opinion which, while the occasion for it arose upon the Treaty of Versailles of 1919 and other treaties, contains remarks upon the general law which would prevail in the absence of treaties. There was in question the rights of German settlers in the territory ceded to Poland holding land from the Prussian Government under certain contracts and leases the precise nature of which it is unnecessary to state here. The Court said:—

‘Private rights acquired under existing law do not cease on a change of sovereignty. . . . Even those who contest the existence in international law of a general principle

¹⁰ Cited by Pitt Cobbett, *Leading Cases on International Law* (5th ed) vol. ii, p. 303.

¹¹ Publications of the Court, Ser. B, No 6.

of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty. . . . No treaty provision is required for the preservation of the rights and obligations now in question.

It would perhaps be more realistic to say that cession, while transferring *imperium*, does not *per se* affect *dominium*; for once the cession has taken place the *dominium* is at the mercy of the new sovereign and cases have occurred in which, in spite of treaty obligations purporting to protect the old proprietor under his new sovereign, his land has been confiscated with little or no compensation, for instance, in pursuance of a policy of establishing a system of peasant proprietorship.

C.—CHANGE IN NATIONALITY.¹²

We shall see that States parties to a peace treaty may validly bind themselves to dispose of the private property of their nationals in a high-handed manner. The same is true of their power to affect the national status of their nationals *in invitum*. One of the attributes of sovereignty being the allegiance of those persons who possess the nationality of the sovereign, it follows that a cession of the sovereignty over a particular area of territory involves *per se* a transfer to the acquiring State of the allegiance and nationality of the nationals of the ceding State who at the time of the cession are connected by a certain tie with the territory ceded. Whether that tie is residence alone or domicile alone or a combination of both is controversial, and it is possible that it may depend upon the laws of the two States respectively, for it cannot be said that more than a small portion of the field of nationality is at present regulated by public international law. Dicey, in the case of the cession of British territory (Rule 38), and the acquisition of foreign territory by the Crown (Rule 26), confines the change of nationality to nationals of the ceding State who are 'resident', and says that in the latter case it is uncertain whether the nationality of persons domiciled but not resident at the time of the cession becomes British.

Nor is it clear whether the nationals of the ceding State who are resident or domiciled in the ceded territory can avoid the change of nationality by quitting the territory ceded immediately after the completion of the cession. Westlake¹³

¹² The matter is discussed in great detail by Keith, *Theory of State Succession* (1907) ch. vi.

¹³ *Private International Law* (7th ed. Bentwich), § 299.

says that upon the cession of British territory British nationals lose their British nationality 'unless they transfer their domicile to some territory which remains British, either within the time limited for that purpose by the treaty, or immediately if no such time be limited'. Dicey¹⁴ assumes that nationals of the ceding State who continue to reside on territory ceded to the Crown become British.

The hardship of an involuntary change of nationality has led with increasing frequency in recent years to the adoption of one of the following forms of mitigation:—

(a) *Plebiscite*: the treaty may stipulate for the cession of particular pieces of territory to depend upon the result of a plebiscite by the nationals of the ceding State inhabiting the territory; such a provision occurs in several articles of the Peace Treaties of 1919—1920, but it was not generalized;

(b) *Option of nationality*: the treaty may give the nationals of the ceding State inhabiting the territory ceded an option to retain the nationality of the ceding State; if they exercise that option, the acquiring State may, in default of contrary stipulation, expel them as any aliens may be expelled;

(c) *Option to emigrate*: the treaty may give the inhabitants an option to emigrate within a certain time and also retain their nationality.

The growth of the principle of self-determination tends to favour the adoption of one or more of these palliatives. It must, however, be emphasized that the law does not enjoin them and they do not apply unless the contracting parties choose to adopt them.

D.—CHANGE IN DOMICIL?

Domicil, unlike nationality, is not a political conception and is independent of a person's nationality or change of nationality.¹⁵ Suppose that an American citizen with a domicile in Massachusetts becomes naturalized as a British subject after the necessary period of residence in England. His change of nationality does not change his domicile, though the adoption of British nationality may be a factor in deciding what his domicile is by throwing light upon his intention as to where his home is.

Suppose X, a British subject, to be domiciled in a British West-Indian island, which is ceded by the British Empire to Mexico. In default of any power to opt to retain his nationality,

¹⁴ Comment on Rule 26.

¹⁵ *Udny v. Udny* (1869) L. R. 1 Sc. App. 441.

he loses his British nationality and becomes a Mexican national. He remains in the island. What happens to his insular domicile? To-day the island has its own legal system, is a 'country' in Dicey's sense of the term—'a territory subject to one system of law'. If Mexico maintains that system of law without change, I apprehend that X's domicile remains that of the island. If Mexico changes the legal system by incorporating the island in its own territory, what is the position? Dicey tells us (Rule 4) that 'a domicile' once acquired 'is retained until it is changed in the case of an independent person by his own act'. X's relation to the insular territory remains the same both in fact and intention, but the legal system under which he is living has been changed *in invitum*; instead of being that of the island, it is now that of Mexico. I am not aware of British authority, but I suggest that he acquires the domicile attaching to Mexican territory. A domicile he must have, and he can only have one (Rules 2 and 3). What else can it be? There is no longer any such thing as the insular domicile. It has been extinguished by act of law.

E.—THE SCOPE OF A STATE'S POWER TO AFFECT THE PRIVATE RIGHTS OF ITS NATIONALS.¹⁶

It has often been said that the more elementary a proposition of law is, the more difficult it is to find specific authority for it. It is nevertheless sometimes possible to prove a proposition by the citation of a number of decisions which can only be justified on the assumption that it is valid.

It appears that international law treats a State as being invested for international purposes with complete power to affect by treaty the private rights of its nationals, whether by disposing of their property, surrendering their claims, changing their nationality or otherwise. (Similarly a State can by treaty acquire rights for its nationals, but it would be out of place here to inquire whether these rights can be directly conferred upon and enforceable by those nationals or can only be enforced by their State on their behalf.)

Many instances of the exercise of this power are to be found in the peace treaties concluded at the end of the war of 1914—1918.

In *The Blonde*¹⁷ Lord Sumner, delivering the opinion of the Privy Council, said:—

'There can be no doubt that Germany was competent,

¹⁶ See McNair, *Law of Treaties*, ch. 29.

¹⁷ [1922] 1 A. C. 313, 335.

on behalf of those nationals who were German subjects within the operation of the treaty, to make cessions which would bind them and effect a transfer of their rights of property, as if the cession had been made personally by the owner concerned.'

And later ¹⁸ he referred to the necessity of ascertaining 'that the private party claiming [the release of a prize] is a party presently entitled, who has not, by his own act or by the public act of those who bind him, been divested of his rights of ownership or of possession'.

In another prize case, *The Bathori*,¹⁹ Lord Merrivale said:—

'All that is necessary to establish in favour of the Procurator-General the first of the contested propositions—namely, that the plaintiff-owners of the *Bathori* are within the terms of the Treaty of Trianon, is to show that they, at the date of the treaty, were within the prescribed category "nationals of the former Kingdom of Hungary or companies controlled by them" as to whose possessions under the control of the Allied and Associated Powers Hungary and the Powers could make agreements of valid dispositive effect.'

And the voluminous decisions upon the Peace Treaties given by English Courts after the war of 1914—1918 are based upon the assumption of the validity of a general power in a State by treaty to dispose of the property of its subjects, though it must in fairness be admitted that, although that is the assumption upon which they are based, they are for the most part decisions upon the numerous Treaty of Peace Orders made under corresponding Treaty of Peace Acts and are therefore binding upon British Courts, whether or not as a matter of public international law a State has power to dispose of the private property of its nationals situate outside its jurisdiction.

Certain further questions arise:—

(a) At what date must the persons whose rights a treaty purports to affect be the nationals of a State party to the treaty?

It is believed that, with the possible exception to be mentioned, the persons whose rights a State purports to affect by treaty must be its nationals at the time when the treaty comes into force. Thus it would be absurd that if a year ago I became naturalized in the United States of America and thus lost my British nationality, and then I bought a ship registered in an

¹⁸ At p. 337.

¹⁹ [1933] P. 22, 37; affirmed on another ground [1934] A. C. 91.

American port, the British Government should be able to make a valid transfer of that ship by treaty. But supposing that while a British subject I sustained an injury at the hands of a foreign State and then ceased to be British, could the British Government validly surrender my claim against the foreign Government, on the ground that my injury is really the injury of my country sustained in the person of one of its subjects?²⁰ These questions were referred to in *The Bathori*²¹ but it was unnecessary to decide them. The doctrine of the continuous nationality of claims seems to suggest an answer in the negative.

(b) Is it necessary that the nationals whose rights the treaty purports to affect should at the date when the treaty comes into force be domiciled within the territory of their State?

Certainly not, if the decisions upon the peace treaties are any guide. In countless cases the ex-enemy nationals whose 'property, rights and interests' were subjected by those treaties to a charge in favour of the British Government and appropriated by that Government were domiciled in this country; though, as has already been pointed out, these provisions acquired statutory effect by means of the Treaty of Peace Acts and Orders and therefore could not be questioned in British Courts.

(c) How far is the location of the property which the treaty purports to affect relevant upon the effectiveness of the treaty?

It is believed that a State can validly bind itself by treaty to transfer to another State property of any kind belonging to its nationals, whether that property be situate within the territory of the transferor State or not. Undoubtedly a State can compulsorily acquire the property of its nationals, with or without compensation, and it is not surprising that international law should regard it as capable of alienating that property by treaty. This power seems to be based upon the ownership of its nationals rather than upon the physical situation of the property within the State's territory. If the property transferred is located within the territory of the transferor State or the transferee State there is no difficulty. If it is located within the territory of a third State, and the private owner is recalcitrant and declines to hand it over, and the Courts of that State at the suit of the transferee State refuse (as is probable) to compel him, the difficulty is insurmountable, but that fact does not necessarily prove that such property is legally inalienable by the transferor State.

²⁰ See the *Mavrommatis Case*, Publications of the P. C. I. J. Ser. A, No. 2, p. 11.

²¹ *Supra*, note 19. And see an analysis of this case in British Year Book of International Law, 1934, pp. 172—178.

Numerous instances of the transfer of private property by treaty will be found in Part VIII (Reparation) of the Treaty of Versailles of 1919.

When the treaty specifies the location of private property transferred, as, for instance, where by Article 297 of the Treaty of Versailles Germany agreed that the Allied and Associated Powers should have the right to 'retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates . . .', questions will arise as to the location in point of law of different kinds of property. In solving these questions an English Court could be expected to apply the English rules of the Conflict of Laws as to the location of property. Thus in *The Bathori*²² it was held by Lord Merrivale P. that a claim in prize to damages for wrongful destruction was 'property' within a provision similar to that cited above and was located in the country where it could be enforced.

Immovable property.

We have already seen in the case of a small portion of the coal mines located in the Saar Basin which were transferred by Germany to France an instance of an 'out-and-out' transfer of private property, an instance which is the more remarkable because the disposal of the overriding *imperium* in respect of the whole territory cannot be described as 'out-and-out' transfer.

Debts and other choses in action.

There are points in connexion with the locality of choses in action which are still not clear, though the broad principle is that a chose in action is located in the country in which it is enforceable. The editor of Dicey makes two comments upon the locality of choses in action which are transferred by peace treaties:—

'The most conspicuous recent recognition of the fact of the local situation of choses in action is that contained in the Orders in Council issued under the treaties of peace appropriating the property of foreign nationals within the British dominions [*i.e.* British territory]. In no case has it been possible to escape the operation of these Orders by

²² *Supra*, note 19.

asserting that choses in action are without situation, and, therefore, are not touched by the legislation. In place, efforts have been directed to establishing the true local situation of the various choses in action.'²³

Again, in commenting upon his Rule 153: 'An assignment of a movable which cannot be touched, *i.e.* of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt) [and made therein] is valid,' he says: 'the whole mass of cases of expropriation of German and other enemy property illustrates the principle', *i.e.* that an assignment which gives a good title according to the *lex situs* is valid. He cites by way of illustration *Favorke v. Steinkopf*,²⁴ where the right of a German national to receive an annuity out of a trust fund held by British trustees in England under an English will was 'property, rights or interest' within British territory and passed under the Treaty of Versailles to the British Government, because it would be necessary for the annuitant if he wished to enforce his chose in action to sue in England. Thus the statute under which the Treaty of Peace Order was issued gave to the British Government a good title to the chose in action.

Ships seem to require special mention. In their case the power of a State to transfer by treaty is probably wider than in the case of other property. It is instructive to look at Annex III in Section I of the Reparation Pact of the Treaty of Versailles:—

'1. The German Government, on behalf of themselves and so as to bind all other persons interested, cede to the Allied and Associated Governments the property in all the German merchant ships which are of 1,600 tons gross and upwards.'

'3. The ships and boats mentioned in paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly the German flag; or (b) are owned by any German national, company or corporation, or by any company or corporation belonging to a country other than an Allied or Associated country and under the control or direction of German nationals. . . .'

²³ Note 29, p. 992.

²⁴ [1922] 1 Ch. 174.

It is understood that Germany requires, and required in 1919, that ships flying her flag should be the property of German nationals, so that ships falling under both (a) and (b), are within the principle, submitted above, to the effect that a State can validly bind itself to alienate the property of its own nationals. The extension of the power to cover property within their control is not unreasonable. But there are some States which permit their flag to be flown by ships belonging wholly to aliens. Has such a State power to bind itself by treaty to alienate such ships flying its flag? It is believed that the answer is in the affirmative. International law does not dictate to States the conditions in which they should permit the use of their flag, but it is vitally interested in the flag because it is the flag and the State jurisdiction which it involves that insure that there shall be law and order upon the high seas and not anarchy. The fact that a flag subjects a ship to the jurisdiction of the flag-State and to a large part of the law of that State, regardless of the ownership of the ship, invests the State with a peculiar degree of power over the ship, wherever she may be, and I have little doubt that the flag State could validly bind itself to alienate such ships. A ship is in many respects unlike other chattels.²⁵

Surrender of claims.

Not only can a State bind itself by treaty to alienate the property of its nationals; it can surrender their claims either against the other contracting party (in which case they may also be its own claims for injuries sustained by it in the persons of its nationals) or against the nationals of that party; it can accept for them any restrictions and disabilities in the way of trading or otherwise. In fact, the principle would appear to be that it can bind itself by treaty to affect the rights of its nationals, both proprietary and personal, in whatever way a State can affect the persons and things subject to its sovereignty. Supposing a State agreed by treaty to make a capital levy amounting to fifty per cent. upon all property belonging to its nationals, and transfer the proceeds to the other contracting party, that treaty would be binding even though it would be necessary for the paying State to alter its laws before it could fulfil the treaty. The power of a State to transfer the allegiance and change the nationality of its subjects has already been referred to.²⁶

²⁵ See McNair in 56 L. Q. R. (1941) pp. 33—73.

²⁶ *Supra*, Section C.

F.—EFFECT UPON NATIONALS OF THIRD STATES.

That a peace treaty does not normally affect the private rights of nationals of non-contracting parties is merely an example of the general principle *pacta tertiis nec nocent nec prosunt*. Thus when two Frenchmen in 1925 sued a German national for a balance of a pre-war debt in Switzerland, where he was living, and it was objected that the action was incompetent by reason of the Clearing Office procedure set up by Article 296 of the Treaty of Versailles for the purpose of settling claims between French and German nationals, it was held by the Swiss Federal Court that a treaty to which Switzerland was not a party could not operate to withdraw an action otherwise competent from the Swiss Courts.²⁷ And the German Reichsgericht in 1934 held²⁸ that a German national could recover a credit balance from a Danish bank, although the bank had paid over in April, 1918, *i.e.* before the Treaty of Versailles, the balance to a French Administrator who had been appointed (apparently) to carry out the liquidation of the assets of German nationals carrying on business in France. A full report is not available to me, but it appears that the defendant bank invoked Article 297 of the Treaty of Versailles by way of retrospective validation of the liquidation of the assets of the German national. Since, however, that Article referred only to the 'property, rights and interests' of German nationals *within Allied territory*, and the credit balance was located in Denmark, the provisions of the treaty did not extend to it. Apart, however, from this point, it is difficult to see how the treaty could oblige the Courts of a neutral State to give effect to the transfer of a debt located therein.

Where, however, a national of a neutral State living in the territory of a party to the Treaty of Versailles, for instance a Norwegian living in England, owed a sum at the outbreak of war to an Austrian company, and after the war was sued in England by the Austrian company and the British Administrator of Austrian property, the latter recovered; the debt was locally situated in England and was the property of an Austrian company; therefore it was competent to Great Britain and Austria to agree by treaty upon its disposition. This view appears to be entirely in accordance with English principles of the conflict of laws, for the property was situated in England.²⁹

²⁷ *Trampller v. High Court of Zurich*, Annual Digest, 1925—1926, Case No. 265. See also *Deutsche Bank v. Zirini*, Annual Digest, 1919—1922, Case No. 235.

²⁸ *M. v. Aktieselskabet K. H.*, Annual Digest, 1933—1934, Case No. 217.

²⁹ *Josef Inwald A. G. v. Pfeiffer* (1928) 43 T. L. R. 399; 44 T. L. R. 352 (H. L.).

G.—HOW FAR A PEACE TREATY CONCLUDED BY THE BRITISH CROWN INVOLVES LEGISLATION.

In the British Empire the treaty-making power resides in the Crown acting under the royal prerogative upon the advice of one of His Majesty's Governments. The Crown is responsible for the negotiation, the signature and, when necessary, the ratification of treaties. Parliament does not ratify treaties, but when a treaty requires for its application and enforcement in the United Kingdom some change in or addition to the law administered in our Courts or the acquisition by the Crown of some new powers not already possessed by it, or when it involves the incurring of some financial obligation, it is necessary for Parliament to legislate to this end in order that the treaty may be observed. Moreover, when a treaty involves the cession of British territory there is a practice, now amounting probably to a constitutional convention, whereby the treaty receives the approval of Parliament expressed in a statute.³⁰

If we apply these principles to modern peace treaties, we shall find several reasons why legislation is required.

(a) *Impounding or confiscation of enemy private property.*

According to English law, the outbreak of war does not *ipso facto* operate to vest enemy private property situate in this country in the Crown. On several occasions during the war of 1914—1918 it was asserted by the highest judicial authority that the practice of confiscating private enemy property in time of war was obsolete.³¹ This is controversial, but at any rate there is little doubt, so far as England is concerned, that there is no automatic confiscation, and that if the Crown desires to confiscate enemy private property it must resort in each case to the ancient process of 'inquisition of office', which has been described by Warrington L.J. (as he then was) as 'inconvenient and expensive', and, moreover, only available before the conclusion of peace.³² Accordingly, if the United Kingdom Government decided to confiscate enemy private property in this country and to insist upon a stipulation in the peace treaty recognizing the confiscation, it would almost certainly ask Parliament to pass the legislation required to enable this to be done by administrative action.

³⁰ The preceding statements are somewhat dogmatic. For argument and illustrations see McNair, *Law of Treaties*, ch. ii.

³¹ See the authorities collected in Oppenheim, vol. ii, § 102, n. 3.

³² *Re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 107, 139.

As during the war of 1914—1918, enemy private property during the present war has been vested by the Trading with the Enemy Act, 1939,³³ in a Custodian of Enemy Property 'with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace'. These provisions are protective, not confiscatory, and further legislation would be required if it was decided to confiscate the property in the hands of the Custodian.

(b) *Debts and other claims as between persons who during the war were 'enemies' in the territorial sense.*³⁴

The effect of the outbreak of war is to suspend, not to abrogate, debts to, and accrued claims by, enemies which are being recovered or prosecuted or are capable of being recovered or prosecuted in British Courts, and in many foreign countries the legal effect is the same or similar. By 'enemies' is meant in this country not enemy nationals but an enemy State, or any person resident or carrying on business in enemy or enemy-occupied territory, or any body of persons incorporated under the laws of an enemy State or controlled by enemy persons, that is, broadly speaking, enemies in the territorial sense. Accordingly, the moment a state of war has ceased, the *status quo ante* revives, and the Courts of the ex-belligerents are, in the absence of contrary provisions, once more open to the now ex-enemy litigant.³⁵ This may be considered undesirable and is likely to lead to much congestion. The peace treaties of 1919—1920 averted much of this result by devising procedure which was partly administrative and partly judicial. The administrative part consisted of Clearing Offices set up in each ex-belligerent country, and the judicial part consisted in the creation of Mixed Arbitral Tribunals to which certain of the claims not settled by agreement between the Clearing Offices were referred and which applied the law relevant to the claim in question, subject to any modification of it by the treaty.³⁶

³³ S. 7. The formula was different in the Trading with the Enemy Acts of the war of 1914—1918.

³⁴ The statutory definition will be found by reading together ss. 2 and 15 of the Trading with the Enemy Act, 1939, as subsequently added to and amended from time to time.

³⁵ Whether during the war time runs under the Limitation Act, 1939, or not, is controversial: see McNair, *Legal Effects of War* (1920) pp. 60, 61. The peace treaties of 1919—1920 suspended periods of prescription and limitation of actions for the duration of the war and three months after the treaties came into force: see Article 300 of the Treaty of Versailles.

³⁶ This is a popular statement of the effect of some very complicated and detailed provisions of the peace treaties. The procedure referred to applied, in

The fact that the Anglo-German Mixed Arbitral Tribunal was not dissolved until 1932 is some measure of the amount of litigation which was thus withdrawn from the ordinary Courts of law.

It is obvious that treaty provisions of this nature deprive persons of the right to litigate in British Courts and therefore require legislation.

(c) *Contracts between those who during the war were 'enemies' in the territorial sense.*³⁷

If the parties to the peace treaty desire to modify the effects of the outbreak of war which are recognized by their respective legal systems and which would be applied by their respective Courts or to clarify the relevant law, they will insert the necessary provisions in the peace treaty. Here again, if any change in English law is involved, legislation is required. Many illustrations will be found in Articles 299 to 303 (with Annex) of the Treaty of Versailles, entitled 'Contracts, Prescriptions and Judgments'.

(d) *Miscellaneous.*

The dislocation of commercial intercourse which results from a modern war on a large scale is so enormous that it is virtually impossible to clear up the debris by resort to the normal legal machinery, and it will usually be found to be essential that the peace treaty should create its own code for the purpose. For instance, the Treaty of Versailles contains several Articles dealing with patents, trade marks, designs and copyrights.³⁸

H.—THE RELATION OF THE BRITISH CROWN TO ITS SUBJECTS IN REGARD TO A PEACE TREATY.

The treaty-making power of the Crown is an exercise of the royal prerogative. Subject to the general control exercised by

general, to debts and claims as between the nationals of one ex-belligerent residing in its territory and the nationals of an opposing belligerent residing in its territory, that is, the tests of nationality and residence were combined.

³⁷ See note 34 above.

³⁸ A bird's-eye view of the articles of this treaty relating to debts, contracts, private property, rights and interests, industrial property, clearing offices and mixed arbitral tribunals, can be obtained from Picciotto and Wort, *The Treaty of Peace with Germany* (1919).

The British Government appears to have taken the view in 1935 that the Treaty of Peace Act, 1919, s. 1 of which empowered His Majesty to 'make such Orders in Council and do such things as appear to him necessary for carrying out the said Treaty and for giving effect to any of the provisions of the said Treaty', enabled the Crown by Order in Council to apply economic sanctions against Italy in the Ethiopian dispute under Article 16 of the Covenant (and of the Treaty); see Oppenheim, vol. ii, § 52*d*, n. 4, on p. 135.

Parliament over the Executive, there is probably no sphere in which the royal prerogative is more active in modern times than the sphere of foreign relations—the making of war and peace, the acquisition of new territory, the cession of British territory (subject probably to the constitutional convention mentioned in Section G), and the conduct of intercourse with foreign Powers. The consequence is that, although a treaty involving a change in or addition to our law cannot be carried out without the aid of a statute, the Crown is largely free from the control of the Courts of law in the making and the carrying out of a treaty. If the aid of the Courts is invoked, it is sometimes said that the making of the treaty or the acquisition or cession of territory is an ‘act of State’ and not cognizable by the Courts, though in this connexion ‘act of State’ does not mean the same thing as it does when used to defeat a claim made by a non-resident alien upon the Crown.³⁹

Two types of case may be referred to as illustrations:—

(i) In the first it is alleged that the Crown, by acquiring new territory, either by annexation or cession, has become liable upon obligations which bound the former sovereign of that territory. In *Cook v. Sprigg*,⁴⁰ which arose out of the acquisition of Eastern Pondoland, apparently by cession from its paramount chief, the Privy Council advised the Crown that, even if the Prime Minister of Cape Colony (to which the ceded territory was annexed) could be sued under a Cape Colony statute, no action would lie against him at the suit of the holders of concessions from the former sovereign of the territory.

‘The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State . . . It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.’

This opinion was followed by the King’s Bench Division in *West Rand Central Gold Mining Co. v. R.*,⁴¹ where a British

³⁹ *Buron v. Denman* (1848) 2 Ex. 167.

⁴⁰ [1899] A. C. 572, 578.

⁴¹ [1905] 2 K. B. 391.

company unsuccessfully sought by petition of right to recover compensation against the Crown in respect of gold seized before the outbreak of war by the Government of the South African Republic, whose territory had been annexed by the Crown upon the subjugation of the Republic. There was no treaty in the international sense.

And an important extra-judicial confirmation of the same is to be found in a passage contained in the Report of the Transvaal Concessions Commission⁴² appointed in 1900:—

‘It is clear that a State which has annexed another State is not legally bound by any contracts made by the State which has ceased to exist, and that no Court of law has jurisdiction to enforce such contracts if the annexing State refuses to recognize them.’

(ii) In the second type of case an attempt has been made to subordinate acts and omissions by the Crown within this domain of ‘act of State’ to the jurisdiction of the Courts by alleging that the Crown in making a treaty acted as the trustee or agent of a class of persons of whom the suppliant is a member. In *Rustomjee v. The Queen*⁴³ a British subject brought a petition of right against the Crown to recover a sum of money which he alleged to be due to him as a Chinese merchant and to have been received by the Crown from the Emperor of China in pursuance of a treaty between them. In dismissing the petition in the Court of Appeal, Lord Coleridge C.J. said of the Queen:—

‘She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing it, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts. . . . We do not say that under no circumstances can the Crown be a trustee; we do not even say that under no circumstances can the Crown be an agent; but it seems clear to us that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for any subject whatever.’

The same device was attempted by the suppliant in *Civilian War Claimants’ Association v. The King*,⁴⁴ in which an attempt was made by assignees of the claims of certain civilian sufferers,

⁴² Parliamentary Papers, South Africa, 1901 [Cd. 623], cited in Pitt Cobbett, *Leading Cases and Opinions*, vol. ii (5th ed.) p. 303.

⁴³ (1876) 1 Q. B. D. 487; 2 Q. B. D. 69, 73.

⁴⁴ [1932] A. C. 14.

in person or in property, from enemy air raids and bombardment during the war of 1914 to 1918 to recover from the Crown a rateable proportion of the sums received by the Crown from Germany on account of reparations in pursuance of the Treaty of Versailles. On demurrer by the Crown, the petition was dismissed by the judge of first instance, the Court of Appeal and the House of Lords, following the *Rustomjee Case* and expressly repudiating the doctrine of agency or trusteeship. Lord Atkin said ⁴⁵:—

‘ . . . When the Crown is negotiating with another Sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the sovereign State, unless indeed the Crown chooses expressly to declare that it is acting as agent. There is nothing, so far as I know, to prevent the Crown from acting as agent or trustee if it chooses deliberately to do so . . . ’

In 1928 the German Reichsgericht came to a similar conclusion upon certain provisions of the Treaty of Versailles (Articles 74 and 297 (i)), whereby Germany agreed with the other contracting parties that she would compensate her own nationals in respect of the retention and liquidation of their assets in Allied territory by the Allied Governments.⁴⁶

⁴⁵ At p. 26. See also for an allegation that a foreign Government is acting as agent or trustee for its nationals, *Administrator of German Property v. Knoop* [1933] 1 Ch. 439.

⁴⁶ Annual Digest, 1927—1928, Case No. 281. See also *ibid.* 1919—1922, Case No. 233.

RESEARCH IN CRIMINAL SCIENCE.

IN August, 1941, the Faculty Board of Law appointed a Committee to consider the promotion of Research and Teaching in Criminal Science. The members of this Committee are Professor P. H. Winfield (Chairman), Dr. L. Radzinowicz Dr. R. M. Jackson and Mr. J. W. C. Turner (Secretary). The scheme which it is exploring comprises:—

1. The prosecution of research.
2. The promotion of a series of publications.
3. The organization of lectures in Cambridge by recognized authorities on various branches of Criminal Science.
4. The analysis of the development of research and teaching in Criminal Science in England and in other countries.
5. The submission through the appropriate channels of memoranda on existing and proposed penal legislation.
6. The transmission to correspondents in other countries of information concerning the achievements and progress of penal reform and of the administration of justice in England.
7. The special application to developments in the British Commonwealth of Nations of such of the above-mentioned activities as are appropriate.

Penal Reform in England, being the first volume of the series *English Studies in Criminal Science*, published under the auspices of the Committee, appeared in December.

The Committee has already made valuable contacts with institutions and workers in Criminal Science in Great Britain and abroad, and has received promises of collaboration in several interesting lines of research which the Committee is pursuing.

We may appropriately add here a note from Dr. W. P. M. Kennedy, Professor of Law in the University of Toronto.

SOME EXPERIMENTS IN THE TEACHING OF LAW.

In the teaching of the law of tort and of criminal law, the emphasis has been too largely on the wrong committed rather than on the interests of society at large, on the injured party and the wrongdoer. As a result the student did not receive a well-balanced integrated picture; while, in addition, the tutor

in the courses on tort would 'refer over' to those on crime and *vice versa*. As a consequence there were gaps in the social view, repetitions in teaching, loose ends in discussion, and a great danger that 'wrongs' were never pulled together in a comprehensive survey. For some years these problems were under discussion in the School of Law in the University of Toronto, and after as careful a consideration as possible, we decided to make some sort of experiment to deal with the situation by combining the lecturing and tutoring in certain courses.

First of all with regard to tort and crime. Here our experience of the past warranted our greatest change. For example, trespass to the person involves not merely a tort but may involve assault, battery, aggravated assault, assault occasioning grievous bodily harm, assault with intent to kill. Again, trespass to property may involve burglary, housebreaking, robbery, and so on. It seemed to us that there would be educational value in viewing these and kindred 'wrongs' in the totality of the legal effects connected with them. We were conscious that there was a danger of too theoretical a product—a student divorced from issues as they might arise in practice. To avoid this danger we proceed on two lines. (i) It was at once obvious that a knowledge of the principles of procedure was necessary if the student, in surveying and studying together 'wrongs', were to grasp the practical differences between the juridical treatment of crime and tort. With this end in view, we provide a course in procedure of a general and descriptive nature in the first year, given by a member of the staff with wide experience in practice. (ii) The combined course in crime and tort is given by *one* man. Thus we attempt to avoid the almost impossible task of working out a scheme, which depends on the two subjects, treated as one, being seen in *one* mind, and discussed through the method developed by *one* individual.

This organization at once raised the problem of how and where to teach the history of English law. Of its value and necessity we are convinced; but of the exact place to teach it we had long been in doubt. We tried one experiment: to give, in the first year, a course on the history of legal institutions and procedure, and in later years, *after* the study of the common law, a course in the history of legal doctrine. This did not accomplish our end. Now, with the newer experiment already outlined, we proceed as follows: the first year course on the history of legal institutions and procedure remains, as it has proved more than valuable; but we have abandoned all other *separate* courses in the history of English law. In place of them,

each individual separate course in substantive law is introduced with a study of its historical development.

We were not, however, satisfied with the unified teaching of tort and crime. We wanted to bring our experiment into contact with other fields of social study. Fortunately, we were able to secure the services of an outstanding member of the staff in psychology with daily practical experience in the Courts and hospitals. On approaching him we found that his work impinged on our problems, and that he was deeply interested in them. As a consequence, he generously offered his services. Every session we provide him with complete copies of the cases and materials to be discussed in 'tort and crime' in order to make him aware of the legal problems. He provides a tutorial class for discussion of the psychological concepts and situations involved. For example, intention, motive, negligence, compulsion, the rules in the *McNaughton Case*, and so on, are discussed from the psychological point of view with the obvious advantage of illuminating the legal issues.

Finally, we were specially interested in the criminal himself, especially in view of the recent *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa, 1938). The possibility of a University Institute of Criminal Law and Criminology lay ahead, and we thought it wise to lay foundations for such a development connected with our School of Law. For years, medical jurisprudence has been a compulsory subject for the LL.B. degree. We wanted, however, something more: the methods and processes of modern psychiatry. Here fortune favoured us. We were able to appoint to the staff in law a man fully qualified as a lawyer and fully qualified as a medical doctor with wide practical experience in the Psychiatric Hospital, to which prisoners are committed for psychiatric examination. My colleague provides lectures and discussions in the final law year on the psychiatric problems connected with the criminal; and the law students in their final year attend once a week psychiatric clinics at the Psychiatric Hospital at which prisoners committed for examination are examined.

In order to complete this survey I should like to say that public crimes—treason and allied offences, information illegally obtained, unlawful assemblies and riots, promoting changes by unlawful means, unlawful drilling, affrays and duels, offensive weapons, seditious offences, piracy, corrupting public officers and officials, misleading justice, offences against religion, offences against morality, and such like—are dealt with in the courses on constitutional and administrative law.

In presenting this outline to a wider public than our own, I have no desire indeed to suggest that it is an ideal scheme. Our School of Law is based fundamentally on the principle that law is a social science, and that law exists to guard social interests. We venture to believe that this foundation gives to law teaching a living interest. The outline which I have here given must be estimated by the manner in which it fits into our basic aims. That it does so we believe experience so far has proved. Of course, it has no absolute aspects, and doubtless time and further experience may lead to modifications. At any rate it may not be unimportant if other law schools know something of what we are trying to do. Sometimes at least there is wisdom in a multitude of councillors.

SIR MAURICE SHELDON AMOS, K.B.E., K.C.

The death of Maurice Sheldon Amos has robbed the combination room of the Cambridge Law Faculty of one of its most vivid personalities and keenest intellects. But our loss is greater than this, for he was much loved for his qualities of heart.

His ancestry is of interest. His grandfather, Andrew Amos (1791—1860), Fellow of Trinity College, Cambridge, 1815, was the first professor of law in University College, London, succeeded Macaulay as member of the Governor-General's Council in India, and for the last twelve years of his life was Downing Professor of the Laws of England.

His father, Sheldon Amos (1835—86), Clare College, Cambridge, was professor of jurisprudence in University College, London (1869—79), and afterwards until his premature death a judge of the Court of Appeal in Egypt.

Maurice followed in their footsteps as Cambridge undergraduate, as servant of the British Commonwealth abroad, as professor of law in University College, London, and as legal writer.

He was born in 1872, was educated privately, won a scholarship at Trinity College, Cambridge, was placed in the first class of the Moral Science Tripos, won the Cobden Prize in 1895, was called to the bar in 1897, and obtained the *licence en droit* at the University of Paris in 1899.

He served in Egypt from 1898 to 1915, first as inspector of native Courts, then as judge (both of first instance and appeal), and lastly as Director of the Khedivial Law School.

From 1915 to 1917 he was engaged in war work, including membership of Lord Balfour's mission to the United States. From 1917 to 1925 he was Judicial Adviser (at first acting and then titular) to the Government of Egypt. After his retirement he was frequently employed by the Government in legal work abroad, both in litigation and conventions, for which his knowledge of continental law and the French language made him most valuable. He served as Quain Professor of Comparative Law in University College, London, from 1932—1937. He was created K.B.E. in 1922 and K.C. in 1932. During the last years

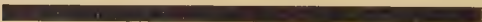
of his life he divided his time between Cambridge and Ulpha, near Broughton-in-Furness. His best-known legal writings are: *The English Constitution* (1930), *Introduction to French Law*, with F. P. Walton (1935), and *The American Constitution* (1938).

This bare record reveals a man of parts and of achievement. But it falls far short of doing justice to his vitality and versatility. He had pursued the higher mathematics and theoretical physics as a hobby. I have heard it said that he was the only amateur mathematician capable of talking intelligently with professionals. He was also a voracious reader of history and literature. He had a keen affection for the United States, to which he made his first visit when a young man. On that occasion he had the good fortune to become acquainted with Mr. Justice Holmes. They talked of the Civil War, in which Holmes was wounded. Holmes was describing where he was at the time. Maurice, who had studied the campaign closely, said: 'Then you must have been in General X's Division'. Holmes turned to him with words which probably gave him greater pleasure than any other commendation in his life: 'Oh admirable young man!'

He was a vigorous talker: to be fair one ought perhaps to say boisterous. Some found his conversation overpowering. Not so many others, including myself, if I may be personal: looking back I count Maurice's conversation, which I was privileged to enjoy from time to time during more than thirty years, as one of the major pleasures of life.

It is not only Maurice who will be missed here. Lady Amos—there never was a more devoted marriage—has many friends in Cambridge. It must be some solace to her that when he died last year he was in the fullness of his powers, chopping trees within a few days of the end.

H. A. H.



NOTES ON RECENT CASES.

CONFLICT OF LAWS—ILLEGITIMATE CHILD—DECLARATION OF LEGITIMACY AND ADOPTION BY FATHER IN CALIFORNIA—HELD, INEFFECTUAL TO LEGITIMATE CHILD IN ENGLAND, AS FATHER NOT DOMICILED IN CALIFORNIA AT DATE OF CHILD'S BIRTH.

Re Luck's Settlement Trusts. [1940] Ch. 864.

UNDER a power of appointment exercised in 1888 in respect of a marriage settlement of 1867, it was directed that the settled property should be held in trust for all the children of the marriage of L and his wife and that, after their deaths, the share of each should be divided among those of his or her children born within twenty-one years of the death of the survivor of the parties to the original settlement. L, the survivor, died in 1896. Under the trusts of L's will, made in 1883, the share settled on each of his children became ultimately divisible among all the children of that child who should attain the age of twenty-one. Both the settlement and will were governed by English law.

In 1906, one of L's children, A, a British subject who was domiciled in England, became the father of an illegitimate son, B, in California, while A was married to C. A subsequently became domiciled in California, and in 1922, his marriage with C having been dissolved, he married D, who was not B's mother. In 1925 he signed a declaration that B was his son, that he had brought him into his family with the consent of his wife, that he had always treated him as one of the family, and wished to adopt him as such; which operated to legitimate him by Californian law. When A died in 1938, B claimed a share in the funds settled under his grandparents' marriage settlement, and under his grandfather's will.

Farwell J. held that B must be regarded as legitimate by the English Courts. The two other points decided hinged on this fundamental one, and are therefore immaterial in view of the reversal of that decision in the Court of Appeal (Sir W. Greene M.R. and Luxmoore L.J.; Scott L.J. dissenting).

As the father had not acquired a domicile of choice in California at the time of the son's birth, the declaration of adoption could not be taken by the English Courts to have rendered the son legitimate. Farwell J. had declared, in reply to counsel's objection that, for the law of the domicile to apply, the father must have been domiciled there at the time of the child's birth, that this consideration applied only in the case of the subsequent marriage of parents. On this ground, he distinguished *Re Wright's Trusts* and *Udny v. Udny*. This point of view was not accepted in the Court of Appeal, and it was declared that the results might be anomalous, as, for instance, if a man had two illegitimate children by two different women: if he subsequently married one of them but did not adopt her child, and then adopted with her consent the child of the other woman, the former child would (apart from the Legitimacy Act, 1926) be regarded in this country as illegitimate, the latter as legitimated.

Legitimacy is not a unilateral matter affecting the child alone. It implies rights and duties attached to other persons. If the question of the effect of the adoption of B were to be determined by the law of his domicile at the time, it would appear that the English Courts would recognize the jurisdiction of a foreign legislature to impose upon a domiciled Englishman the status of paternity which he did not acquire at the date of the child's birth and the potentiality of acquiring which he did not at the time possess.

The dissenting judgment of Scott L.J. was based on a wide citation of authorities and put forward the view that a general international recognition of legitimacy was desirable. He agreed, however, that the domicile of mother and child at the time of B's birth was immaterial, thus disagreeing with an important point in Farwell J.'s judgment.

W. G. O. M.

CONTRACT—CONDITIONS PRINTED ON TICKET LIMITING LIABILITY—NO SUCH LIMITATION ON ANOTHER DOCUMENT WHICH EMBODIED TERMS OF OFFER—TICKET HELD TO BE A RECEIPT—DEFENDANT THEREFORE LIABLE FOR ACCIDENT TO PLAINTIFF.

Chapelton v. Barry Urban District Council. [1940] 1 K. B. 532.

C, who wished to hire two deck-chairs on a beach, went to a pile of chairs belonging to the defendant council near which stood a notice 'Barry Urban District Council. . . . Hire of chairs 2d. per session of three hours'. The notice requested the public to obtain tickets from the chair attendant and to retain them for inspection, but contained no limitation of the liability of the council. C. obtained the two necessary tickets and pocketed them without suspecting them to contain any conditions. On one side of the ticket was written, 'The council will not be liable for any accident or damage arising from the hire of the chair'. C sat down on one of the chairs, whose canvas gave way, and the resulting jar injured him. In an action against the defendants the county court judge found that the accident was due to the negligence of the defendants, but that the defendants were exempted from liability as C. had sufficient notice of the special contract printed on the ticket.

The Court of Appeal reversed the decision of the county court and judgment was given for C.

Slesser L.J. said that he did not think that the notice excluding liability was a term of the contract, for the conditions upon which the defendants offered to let chairs were stated in the notice which was put up by the pile of chairs. This notice made no suggestion of any restriction of their liability, but merely requested the public, for the convenience of the local authority, to obtain tickets from the chair attendant. The object of this ticket was that the person taking it might have evidence at hand by which he could show that the obligation he was under to pay 2d. for the use of the chair for three hours had been duly discharged. The ticket was no more than a receipt and the case was thus distinguishable from cases dealing with railway tickets, such as *Thompson v.*

L. M. & S. Ry. [1930] 1 K. B. 41, where the plaintiff was bound by the provisions of a time-table referred to on the back of an excursion ticket. These provisions negatived the company's liability. They were held to contain the terms upon which the railway company agreed to carry passengers, and the plaintiff was held to have had notice of them.

D. J. A.

CONTRACT—ILLEGALITY—MONEY PAID BY PRINCIPAL TO AGENT FOR ILLEGAL PURPOSE—MONEY NOT APPLIED—HELD, TIME FOR *locus poenitentiae* HAD PASSED AND MONEY WAS IRRECOVERABLE EITHER AS DAMAGES FOR FRAUD OR AS MONEY HAD AND RECEIVED.

Harry Parker, Ltd. v. Mason. [1940] 2 K. B. 590.

M, the defendant, who had employed P, the plaintiffs, a firm of bookmakers, to place a bet of £6,000 each way on one of his horses, counterclaimed for £11,875 paid to P as damages for fraud, or as money received by P to his use.

M alleged that P promised he would place £6,000 with street bookmakers and £6,000 with other bookmakers in various parts of the country, so as not to affect unfavourably the starting price of the horse. M further alleged that he had agreed with, and actually made a sham bet with, P on another horse immediately before the race in which M's horse was unsuccessful.

Stable J. held that neither side could recover, as the agreement was illegal.

The Court of Appeal, in affirming Stable J., held: (1) the bargain involved two illegalities; first that in defiance of the Street Betting Act, 1906, P should make bets with street bookmakers; and secondly, that P and M had conspired to make a sham bet to deceive the public; (2) therefore the rule *ex turpi causa non oritur actio* applied; (3) the time for completion of the illegal arrangement had passed before a claim of repayment was made, and therefore the repentance of one of the parties was of no avail even though the other party had not performed his promise; (4) the relationship of principal and agent afforded no exception to the rule; (5) the rule *ex turpi causa non oritur actio* is not a rule by way of defence. This was pointed out by Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 343: 'If . . . the cause of action appears to arise *ex turpi causa* . . . he [the plaintiff] has no right to be assisted . . . not for the sake of the defendant, but because the Court will not lend its aid to such a plaintiff . . . for where both parties are equally in fault, *potior est conditio defendentis*.'

The rule gives in effect an unmerited advantage to persons in the position of P in this case; an alteration allocating such moneys to charities would be desirable.

R. A. S.

CONTRACT—MASTER AND SERVANT—BREACH OF CONTRACT BY MASTER MAKING FURTHER SERVICE IMPOSSIBLE—BREACH NOT WAIVED BY SUBSEQUENT ACCEPTANCE OF AMOUNTS EQUAL TO SALARY.

Collier v. Sunday Referee Publishing Co., Ltd. [1940] 2 K. B. 647.

C, the plaintiff, was chief sub-editor of the defendants' newspaper. During the contract period the defendants sold the newspaper and C's services were not retained by the purchasers. The defendants continued to pay C the amount of his salary and at their request and as a matter of courtesy, C did some work for them. Later C stopped working and the defendants stopped paying.

Asquith J., giving judgment for C for breach of contract, said that the foundation of the contract was the appointment of C to a specific post, that of chief sub-editor of a specific Sunday newspaper. By selling that newspaper the defendants destroyed the post to which they had appointed C and this was undoubtedly a breach of contract. His Lordship thought the case resembled *Driscoll v. Australian Royal Mail Steam Navigation Co.* [1859] 1 F. & F. 458, where a sailor contracted to work on a particular ship on particular voyages and the ship was sold.

It was argued for the defence that the letters which had passed between the parties after the breach of contract constituted a waiver of the breach and a novation or variation of the contract. But his Lordship found as a matter of fact that C had consistently denied a duty on his part to work for the defendants and had maintained that he was entitled to those payments as part of the damages for the breach of contract.

In contracts for services of a general nature, such as those of commercial travellers and salesmen, it has been held that the servant has no legal complaint if he has nothing to do, provided his salary continues to be paid (*Lagerwall v. Wilkinson & Co., Ltd.* [1899] 80 L. T. 55, and *Turner v. Sawdon & Co.* [1901] 2 K. B. 653). Exceptionally, there may be an obligation on the employer to provide work, e.g. where the servant is remunerated by commission, or where he bargains for publicity. This case makes the following question necessary in considering whether there has been a breach of contract. Is there an implied agreement in the contract to provide employment as well as salary? In most contracts of service there is no such agreement, but where a servant is employed to do a specific service, he is entitled to be allowed to perform that service.

D. J. S.

CONTRACT—SALE OF GOODS—STIPULATION THAT BALANCE OF PRICE 'CAN BE HAD ON HIRE-PURCHASE TERMS OVER A PERIOD OF TWO YEARS'—HELD, TOO VAGUE TO CONSTITUTE CONTRACT.

Scammell v. Ouston. [1941] 1 All E. R. 14.

THE respondents, Messrs. O, opened negotiations with the appellants, S, to acquire from S a new motor van, offering their old van in part exchange. The parties agreed (i) that a new van was to be supplied, (ii) as to its price, (iii) concerning the rebate for the old van, and (iv) that

'this order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years'. Nothing further was agreed as to (iv).

Subsequently S repudiated the transaction, contending that there was no contract, the exact terms of the hire-purchase agreement being dependent on further negotiation.

In the Court of first instance, Tucker J. considered that there had been a contract of sale and purchase, and that the arrangement concerning the hire-purchase terms was merely a condition precedent to the contract becoming an effective contract.

In the Court of Appeal, the Lords Justices upholding Tucker J.'s decision considered that the hire-purchase arrangement was a term in the contract, not a condition precedent. MacKinnon and Goddard L.J.J. took the view that it was a matter of choice for the defendants how the term was carried out.

The House of Lords unanimously reversed this decision, holding that there was no concluded agreement between the parties on two grounds: (a) that the term relating to hire-purchase was too vague for a precise meaning to be attributed to it; (b) that it left essential contractual provisions for further negotiation.

The agreement was essentially a hire-purchase agreement—*i.e.* an agreement of bailment with an option of purchase as laid down in *Helby v. Matthews* [1895] A. C. 471. Nothing had been said (apart from the two years period) as to its terms concerning the instalments payable or the rights of the letter in event of default. Such difficulties the House considered could not be solved by implication. They were not convinced that there were well-known 'usual' terms concerning these questions. They distinguished the case before them from *Hillas & Co., Ltd. v. Arcos* (1932) 147 L. T. 503, and would not consider the agreement between the parties as a concluded bargain.

The House here did not follow the practice of recent years of giving a broad interpretation to terms used in commercial dealings. In future business men, when concerned with hire-purchase, will have to specify details if they desire their agreements to be binding.

J. G. S.

CRIMINAL LAW—'CRIMINAL CAUSE OR MATTER'—PETITION TO THE ARMY COUNCIL TO MITIGATE, REMIT, OR COMMUTE SENTENCE OF COURT-MARTIAL HELD TO BE A 'CRIMINAL CAUSE OR MATTER'.

R. v. Army Council. [1940] 1 K. B. 719.

S had been convicted before a court-martial on five charges of forgery and dismissed the service. The sentences having been confirmed, he petitioned the Army Council, which quashed conviction on four of the charges, but refused to alter the sentence on the remaining charge. S then moved the King's Bench Divisional Court for an order of mandamus that the Army Council be commanded to 'mitigate, remit, or commute' the sentence in accordance with the Army Acts, and paragraph 681 of the King's Regulations. The motion was dismissed, and S appealed.

The Court of Appeal unanimously dismissed the appeal, holding that it had no jurisdiction because the appeal was in a criminal cause or

matter within the meaning of section 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925. Slessor L.J. held that the Army Council, in considering whether it would quash sentences under its prerogative powers or would commute them under its statutory authority, was in both cases acting in a 'quasi-judicial' capacity. Quasi-judicial functions might be civil or criminal. In this case they were criminal. He compared the functions of the Council with those of the Court of Criminal Appeal when reviewing punishments; and distinguished them from those exercised by the so-called military court in *Re Clifford and O'Sullivan* [1921] 2 A. C. 570, and by the Home Secretary. Since the application for mandamus referred to a criminal cause or matter, it was itself a criminal matter.

Goddard L.J. quoted with approval the definition of a criminal cause or matter propounded by Viscount Cave in *Re Clifford and O'Sullivan*, at p. 580: 'It must involve the consideration of some charge of crime, that is to say, of an offence against the public law . . .; and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it. . . .'

It is regrettable that the Court did not take the opportunity of amplifying this *dictum*, which, although imperfect, remains the most authoritative judicial definition of a criminal cause or matter.

S. A. DE S.

CRIMINAL LAW—SEPARATE TRIALS—NECESSARY ONLY WHEN ESSENTIAL PART OF ONE PRISONER'S DEFENCE ATTACKS CO-PRISONER—DISCRETION OF JUDGE—CORROBORATION—WARNING NOT REQUIRED WHEN PRISONER, GIVING EVIDENCE ON HIS OWN BEHALF, IMPLICATES CO-PRISONER.

R. v. Barnes and Richards. (1940) 27 Cr. App. R. 154.

THE case arose out of a bomb explosion in Coventry. The appellants, together with another man and two women, were indicted for murder. Before the trial the women made statements inculcating both appellants, and in giving evidence on their own behalf at the trial inculpated them further. The appellants alone were convicted.

On appeal, counsel contended, first: there should have been separate trials according to *R. v. Bywaters* [1923] 17 Cr. App. R. 66, 69, where it was said that if the defence of one co-prisoner incriminates another there should be separate trials; second: that the two women were in the position of accomplices from the point of view of the prosecution and the jury should therefore have been warned that their testimony needed corroboration. On the question of separate trials the Court said that it lay in the discretion of the trial judge. The passage in *R. v. Bywaters* was interpreted as meaning that a separate trial should take place where an essential part of one prisoner's defence is to attack another. Here this was not the case. In dealing with the main argument on corroboration,

the Court referred to *R. v. Baskerville*, 12 Cr. App. R. 81, 89; [1916] 2 K. B. 658, 665, where it was said: 'The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.' The women here were not giving evidence as witnesses for the prosecution, nor was the jury asked by the prosecution to act upon their evidence. Hence the rule as regards corroboration was held not to apply. The Court approved of the case of *R. v. Martin* [1910] 5 Cr. App. R. 4, 6, as throwing light on the point.

The interpretation put on *R. v. Bywaters* has narrowed the ground for ordering separate trials; and the rule as regards corroboration is confined to witnesses called by the prosecution.

R. W. M. D.

INTERNATIONAL LAW—DIPLOMATIC IMMUNITY OF FOREIGN MILITARY ATTACHÉ
—DIPLOMATIC PRIVILEGES ACT, 1708 (7 ANNE, C. 12), s. 3, HELD TO
BE MERELY DECLARATORY OF THE COMMON LAW.

The Amazone. [1940] P. 40.

THE plaintiff X appealed against a decision setting aside, on the motion of the defendant Y, a writ for possession of the yacht *Amazone* and of a warrant of arrest. The ground of the motion was that Y, as assistant military attaché to the staff of H.M. King of the Belgians, was immune from process and was unwilling to submit to the jurisdiction of the Court, and that the yacht was owned by him and in his possession and control.

It was argued for X that Y had not proved that he owned the yacht, nor even that he had possession; that he derived his immunity solely from the Diplomatic Privileges Act, 1708; and that, before he could claim immunity for his goods he had first to show that they were his goods. Even if Y could claim diplomatic immunity apart from the statute, it was submitted that a mere assertion of possession was insufficient.

The Court of Appeal held that this was to put an altogether too narrow construction on the certificate of diplomatic privilege of the Foreign Office. The view that Y's immunity was derived solely from the Act of 1708 was incorrect; in fact it was derived from the common law, as had been recognized in *Parkinson v. Potter* (1885) 16 Q. B. D. 152. The privilege of embassy was recognized at common law as forming part of international law, and according to that law it was clear that all persons associated in the performance of duties of embassy were privileged; and that an attaché was within that privilege. On the question of how far the privilege extended, Slessor L.J. quoted Dicey's *Conflict of Laws* (5th ed. p. 196): 'An ambassador or other diplomatic agent accredited to the Crown by a foreign State cannot, at any rate without his sovereign's consent, be made defendant here in an action either for breach of contract, or, it would seem, for tort, nor can his property be seized.'

Y had possession of the yacht; and by the common law, on which his

immunity rested (quite apart from the statute), he could not be impleaded in the Courts of this country. The appeal, therefore, failed.

The interest of this case is that quite apart from the interpretation of the Act of 1708 it is a further illustration of the manner in which municipal law has adopted a rule of customary international law.

P. R. O.

REAL PROPERTY—MORTGAGE—DEMISE FOR LONG TERM—REPAYMENT SPREAD OVER FORTY YEARS—HELD, THE MORTGAGE WAS A 'DEBENTURE' WITHIN COMPANIES ACT, 1929, AND THAT THE RULE AGAINST PERPETUITIES DOES NOT APPLY TO MORTGAGES.

Knightsbridge Estates Trust, Ltd. v. Byrne. [1940] A. C. 613.

X, the appellants, in 1931 mortgaged their freehold properties to Y, the respondents, to secure a loan of £310,000. X covenanted to repay by eighty half-yearly instalments: later they claimed to redeem the property by giving the usual notice and paying the principal with interest and costs.

X claimed that (1) the provision that the mortgage should be irredeemable for forty years was void as being a clog on the equity of redemption; and (2) the mortgage deed infringed the rule against perpetuities. Y contended that the mortgage was a debenture within section 74 of the Companies Act, 1929, which provides that a condition in a debenture shall not be invalid by reason only that it makes the debenture irredeemable, or redeemable only on the expiration of a period however long.

The House of Lords in deciding in Y's favour held that the mortgage was within section 74, having regard to the definition of 'debenture' contained in section 380 of the same Act. They followed the Court of Appeal in holding that the rule against perpetuities does not apply to mortgages. Their decision that the mortgage fell within section 74 of the Act rendered it unnecessary to consider whether or not there was a clog on the equity of redemption, and they expressly reserved the point. (For a fuller discussion of this point see the reports of the case in the Courts below [1938] Ch. 741; [1939] Ch. 441; and note in C. L. J. 1939, p. 146.)

Viscount Maugham criticized the judgment of Luxmoore J. on the ground that the Companies Act, 1929, was not a consolidating but an amending Act; hence the wider definition of 'debenture', which first appeared in that Act, was capable of extending the judicial interpretations previously put on that word.

The equitable rule against clogging is based on the hypothesis that in a contract for a loan the borrower is not usually contracting on equal terms with the lender; but loans made to limited companies are very different from loans made to individuals: there is a great deal to be said for freedom of contract in the former. Whether or not there has been oppression of the mortgagor, is for the Court to decide after considering the circumstances in which the mortgage was made.

J. R. L.

TORT—DEFAMATION—STATEMENT DEFAMATORY BY REASON OF SPECIAL FACTS—SUFFICIENT TO PROVE THAT PERSONS WHO KNOW THESE FACTS AND TO WHOM THEY ARE PUBLISHED MIGHT REASONABLY THINK THEM DEFAMATORY, EVEN THOUGH THEY DID NOT BELIEVE THE IMPUTATION.

Hough v. London Express Newspaper, Ltd. [1940] 2 K. B. 507.

THE plaintiff was the wife of Frank Hough, a professional boxer. The Daily Express published an article reading 'Frank Hough's curly-headed wife sees every fight. "I should be more in suspense at home" she says'. The curly-headed woman was not Hough's wife; this was unknown to the defendants on publication of the article, but it was known to certain readers, there being no evidence that any one was misled thereby. The Court of Appeal held unanimously that persons having knowledge of the special facts might reasonably construe the article in a sense defamatory to the plaintiff, even though they did not believe the imputation. Slessor L.J. reviewed the decision in *Cassidy v. Daily Mirror Newspapers, Ltd.* [1929] 2 K. B. 331, with regard to the necessary evidence to be given by the plaintiff of special facts giving the words a defamatory meaning. The mere fact that witnesses were called, with knowledge of the facts, who did not regard the article as defamatory does not acquit the defendants of liability. 'It by no means follows that others with knowledge of the facts would not think otherwise of the plaintiff' (p. 514). Goddard L.J. said (at p. 515) that it is unnecessary, where words are defamatory by reason of special facts, 'to prove more than that there are people who know the special facts and so might understand the words in a defamatory sense'. The question here, as in the case of words defamatory in their ordinary sense, must be, 'might reasonable people who know the special circumstances understand them in a defamatory sense?' 'So if it be said of A, that he is a forger, no witnesses are necessary or indeed can be called to say that they believed the charge; if then, he being a married man, it is said of him 'yesterday he married Miss X' it defames him to those people who know that he already has a wife even if they did not believe he actually committed bigamy' (*ibid*). The learned L.J. however found here, as in *Cassidy's Case*, precisely the same difficulties as did Greer L.J. in holding that reasonable people would in these circumstances impute immorality to the lawful wife (p. 516).

J. F. R.

TORT—FALSE IMPRISONMENT—DETENTION OF SHIP'S STEWARD ON SUSPICION OF CUSTOMS OFFENCE—'OFFENDER' IN CUSTOMS CONSOLIDATION ACT, 1876, HELD TO MEAN 'ACTUAL OFFENDER' AND NOT MERELY ONE REASONABLY SUSPECTED TO BE AN OFFENDER.

Gorman v. Barnard. [1940] 2 K. B. 570.

THE Liverpool customs authorities, suspecting G, the plaintiff, a ship's steward, of harbouring uncustomed goods, detained him in custody for some hours before releasing him on bail; the charge against him was subsequently dismissed. G thereupon sued them for false imprisonment and malicious prosecution; but the Liverpool Court of Passage, accepting

their plea that they had acted upon reasonable and probable grounds for suspicion, gave judgment for the defendants. G appealed, but without contesting the decision on his claim for malicious prosecution.

Section 186 of the Customs Consolidation Act, 1876, after specifying certain offences, enacted that '... the offender may either be detained or proceeded against by summons'. It was argued for G that this could not justify detention merely on suspicion, even though honest and reasonable.

For the defendants it was argued that the wording of the Act was ambiguous, and that the term 'offender' included suspected offenders. Moreover, judicial decisions—notably in *Trebeck v. Croudace* [1918] 1 K. B. 158, and *Isaacs v. Keech* [1925] 2 K. B. 354—had implied in certain statutes a power of arrest on reasonable grounds of suspicion; such a power ought to be implied here.

The Court of Appeal agreed with Scott L.J. that the real question in the case was not—as the Court of first instance had assumed—whether the defendants had acted on reasonable grounds of suspicion, but whether the Act justified arrest at all on such grounds. Clauson L.J. admitted the reasonableness of the defendants' suspicions; but he could not, as a matter of English language, give the suggested larger meaning (*i.e.* of 'suspected offender') to the word 'offender' in section 186. Scott L.J., basing his opinion on the natural meaning of the word and on its context, agreed with this interpretation. The Court therefore decided, by a majority (MacKinnon L.J. dissenting) in G's favour.

MacKinnon L.J. cited *Trebeck v. Croudace* and *Isaacs v. Keech* as being applicable here—decisions authorising arrest, on suspicion of drunkenness while driving and soliciting by a prostitute respectively. His colleagues, however, sought to limit the application of this principle—Scott L.J. to cases where 'an immediate need of arrest' arises 'to prevent injury to the public' (p. 583) and Clauson L.J. to offences such '... that in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for' (p. 588).

P. K. W. H.

TORT—INDUCEMENT TO BREAK A CONTRACT—DISPUTE BETWEEN OWNER AND TENANTS—PERSUASION BY DEFENDANTS (TENANTS) OF OTHER TENANTS NOT TO PAY THEIR RENTS TO OWNER—HELD, THIS WAS NOT A 'COMMON INTEREST' WHICH JUSTIFIED DEFENDANTS.

Camden Nominees, Ltd. v. Forcey. [1940] Ch. 352.

A block of flats was let to tenants (one of whom was the defendant F), who paid rent one month in advance, and in return the owners provided central heating and other services. The tenants, complaining about the services, were persuaded by F to form an association, whose members withheld their rent. The plaintiffs brought an action against F, the chairman of the association, to restrain her from inducing the others to break their contracts. Simonds J. granted them an injunction and nominal damages.

F pleaded that (i) there was no inducement, as the tenants

spontaneously agreed to withhold their rent, and (ii) if the Court found there was inducement, then there was justification, because the plaintiffs had broken their contract.

Simonds J. found for the plaintiffs on the first point, as there were witnesses to prove that F did induce the others to break their contracts. On the second defence he referred to *Quinn v. Leathem* [1901] A. C. 495, 510, where Lord Macnaghten said: 'It is a violation of legal right to interfere with contractual relations recognized by the law if there be no sufficient justification for the interference.' Simonds J. reviewed several cases where justification had been pleaded, which showed the difficulty of determining it. In *Pratt v. British Medical Association* [1919] 1 K. B. 244 McCardie J. held that no justification existed if the action was for advancement of trade interests, and in *De Jetley Marks v. Greenwood* [1936] 1 All E. R. 863, 873, Porter J. stated: 'The justification must, I think, involve an action taken as a duty, not the mere protection of the defendants' own interests.'

Simonds J. then discussed *Brimelow v. Casson* [1924] 1 Ch. 302, which F claimed was analogous to her own case. He said (at p. 366): 'There is no real analogy between the two cases', because F did not have a duty to her fellow-tenants, and their grievances could have been remedied at law, whereas in *Brimelow v. Casson* Russell J. stated (at p. 313): 'These defendants . . . owed a duty to their calling and to its members, and, I am tempted to add, to the public', and thus were justified.

This decision does not go so far as holding that common interests can never be a justification for an inducement to break a contract, although in this case they did not justify it.

B. B. P.

TORT—INDUCEMENT TO BREAK A CONTRACT—HONEST, BUT STUPID AND MISTAKEN BELIEF OF DEFENDANT THAT HIS INDUCEMENT WAS LAWFUL HELD TO BE A DEFENCE.

British Industrial Plastics, Ltd. v. Ferguson. [1940] 162 L. T. 313.

D had been employed by the plaintiffs and, on leaving, agreed not to disclose a secret process of the company. Later D approached F, the managing director of the defendant company, and offered this process as his own. F realized its value, but fearing it might be secret, sent D to his patent agent. He did this in the honest belief that, if it was found patentable, the process could not be secret, and in due course the patent was filed.

The plaintiffs sued D for breach of contract, F for inducement to break the contract, and all the defendants for conspiracy to break the contract. Judgment was given for the defendant F, and against D for £15,000. The plaintiffs' appeal was dismissed, and they appealed to the House of Lords.

Their Lordships unanimously dismissed the appeal. Lord Russell of Killowen said that he saw no reason to differ from Porter J.'s finding that F had no actual or constructive knowledge, and stated (at p. 315): 'The appeal must . . . fail so far as regards the only disclosure pleaded, namely

disclosure to the respondents themselves.' He then refuted the argument that disclosure to the patent agents was disclosure to the respondents, and went on to say that, even if that claim had been pleaded, patent agents were not agents, in the legal sense, of the respondents.

Lord Romer admitted F's stupidity, but could not differ from the trial judge's opinion of his honesty. He also agreed (at p. 316) that 'the patent agents were in no sense the agents of the respondents', even if disclosure to the agents had been covered by the plea.

This decision shows there is no such thing as unintentional inducement to break a contract. It is a sufficient defence that the party acted *bona fide* if mistakenly, provided he did not wilfully exclude the means of knowledge.

B. B. P.

TORT—MASTER AND SERVANT—NEGLIGENCE OF MASTER OWING TO BREACH OF STATUTORY DUTY IN NOT ADEQUATELY FENCING DANGEROUS MACHINERY —SERVANT'S CONTRIBUTORY NEGLIGENCE HELD DOMINANT CAUSE OF ACCIDENT.

Lewis v. Denye. [1940] A. C. 21.

L, the plaintiff, sued D, the defendant, the occupier of a woodworking factory, in whose employment L was, claiming damages for breach of statutory duty whereby his hand was seriously injured by coming in contact with the teeth of a power-driven circular saw which he was using.

Tucker J. found that the saw was insecurely fenced according to section 10 (1) (c) of the Factory and Workshop Act, 1901, and the Woodworking Machinery Regulations, 1922. L was supplied with a 'push-stick' according to these Regulations for the purpose of pushing through the wood but he was not using this when the accident happened. Tucker J. held that, though D had committed a breach of his statutory duty in failing to have the saw securely fenced, L could not recover by reason of his own contributory negligence in not using the 'push-stick'. The Court of Appeal and House of Lords affirmed this decision.

Viscount Simon L.C. said that he was not satisfied that a breach of the Regulations for Dangerous Trades imposing duties on workmen automatically furnishes a defence to the employer who is sued for damages for breach of statutory duties imposed on the employer, but the workman's breach may, as in this case, provide evidence of his own negligence. In *Caswell v. Powell Duffryn Associated Collieries, Ltd.* [1940] A. C. 152, Lord Atkin said (at p. 164) that the Coal Mines Act, s. 55, did not in terms create a cause of action, but that the injured party must show a breach of duty and also that his hurt was due to that breach. Thus if the injury results partly from a breach of statutory duty by the defendant and partly from the plaintiff's omission to use ordinary care for his protection, the plaintiff ought not to recover, unless his negligence did not operate to produce the damage. The Lord Chancellor also approved the dictum of Lawrence J. in *Flower v. Ebbw Vale Steel, Iron & Coal Co.* [1934] 2 K. B. 132, 140, that too high a standard of care must not be demanded from a workman familiar with the machinery which was dangerous, but that in the present case the plaintiff's action was a

'highly dangerous proceeding' which contributed to his injury so as to exonerate the defendant from liability.

The opinion of the House was reserved (subject to a qualification by Lord Atkin) as to the correctness of the view expressed by Salter J. in *Davies v. Thomas Owen & Co.* [1919] 2 K. B. 39, 41, that 'if a machine cannot be securely fenced, while remaining commercially practicable or mechanically useful, the statute in effect prohibits its use'.

D. D. C.

TORT—NEGLIGENCE—DAMAGES—PERSONAL INJURIES—LOSS OF EXPECTATION OF LIFE—MODE OF ASSESSMENT.

Benham v. Gambling. [1941] 1 All E. R. 7.

A boy aged two and a half years was injured in a road accident due to the appellant's negligence, and died without regaining consciousness. Damages for loss of expectation of life were assessed at £1,200. The assessment was upheld by a majority decision of the Court of Appeal.

The House of Lords, in a speech of Viscount Simon L.C., in which all concurred, held that the proper assessment of such damages in this case, where the prospects of the boy were particularly favourable, was £200.

The only issue with which the House was concerned was the problem of assessment. In *Rose v. Ford* [1937] A. C. 826, no question as to the correctness of the figure at which damages were assessed was before the House of Lords. Such assessment, said the Lord Chancellor, was not to be made on a statistical basis: figures calculated to represent the average expectation of life at various ages could not be applied to an individual case. The thing to be valued was not the prospect of length of days, nor future pecuniary prospects, but the prospect of a predominantly happy life. The right sum to award depended on an objective estimate of what kind of future on earth the victim might have enjoyed. The figure should be reduced in the case of a very young child, because there was so much uncertainty about the child's future that no confident estimate of prospective happiness could be made. The truth was that an estimate of damages under this head was an attempt to equate incommensurables; therefore a very moderate figure should be chosen. A hope was expressed that the decision would help to set a lower standard of measurement.

When one is dealing with cases of loss of expectation of life, although the award is for the benefit of deceased's estate, one is often in effect giving a solatium, not to the person injured, but to the person entitled to that estate, however untrue this may be in theory. Therefore it is quite reasonable that if any damages are to be awarded under this head, they should be very moderate. And in this respect the present decision is an advance. But it is undesirable that judges should vary in their assessment. And the excursion of the noble and learned lords into the ethical value of human life can hardly be said to have given any practical guiding principle to judges and juries.

It is submitted that there is no principle upon which such damages can be assessed; and that as they are not in any way exemplary, but in

theory based on the value of the victim's life to the victim, they should either be abolished altogether, or fixed at a moderate sum for each case, irrespective of the age of the victim. The latter alternative could be accomplished in some degree, if the Courts were to take the award in this case as a maximum.

C. L. D.

TORT—NUISANCE CREATED BY TRESPASSER ON OWNER'S LAND—KNOWLEDGE OF NUISANCE IMPUTED TO OWNER THROUGH SERVANT—OWNER HELD LIABLE FOR CONTINUING NUISANCE.

Sedleigh-Denfield v. O'Callaghan. [1940] A. C. 880.

AT one end of X's lands ran a ditch which had always drained off, without flooding, the water from the surrounding land. This ditch on leaving X's land ran westward through the neighbouring plot to the road. In 1934, Y, the owner of the neighbouring plot, contracted with the Middlesex County Council to install a culvert in the line of the ditch through her grounds to be connected with a sewer in the road. In doing this the head of the pipe was placed just within X's land without his permission or knowledge, and therefore unlawfully. On this was fixed a grating in such a position as to be useless to stop the pipe being choked up with leaves. Between 1934 and 1937 the owner's servants and helpers periodically cleaned out the ditch. In 1937 after a heavy rainfall the pipe became blocked, causing the water to escape and flood Z's premises situated to the east of the grating. Evidence was given that if the grating had been placed correctly the pipe could not have become blocked. Z sued X for nuisance.

The defences of act of God and inevitable accident were not raised. Instead, X pleaded that he had never consented to the culvert being placed in his land and was ignorant of its existence. However, it was shown that the ditch had been cleaned out by X's servants, who must have been aware of its existence, and therefore X must be taken to have had knowledge of it. The House of Lords, reversing the decision of the Court of Appeal, held X liable.

The Court of Appeal followed the decision in *Job Edwards, Ltd. v. Birmingham Navigations* [1924] 1 K. B. 341, holding that an occupier was not liable for a nuisance created by a trespasser unless he allows it to continue by act or default, and that mere refusal or neglect to remove the nuisance is not a default. The House of Lords, however, preferred the dissenting judgment of Scrutton L.J., in the above case, which had generally been accepted as the correct interpretation of the law. Thus the occupier is liable for the continuance of a nuisance created by a trespasser if he continues or adopts it. They interpreted 'continues' as having knowledge, actual or presumed, of its presence, and 'adopts' as making use of the object. Their Lordships also would not follow the distinction of Bankes L.J. in *Job Edwards, Ltd. v. Birmingham Navigations* between the duty of an occupier with regard to a public and a private nuisance.

Therefore, an occupier is now liable for any damage resulting to his

neighbour from a nuisance, public or private, which is caused by something on his land, even if it is placed there by a trespasser, provided the occupier has knowledge, actual or presumed, of its existence. How much of *Job Edwards' Case* is left is not clear; the actual decision in it may be supportable on other grounds, but *Sedleigh-Denfield's Case* leaves even that uncertain (see pp. 893, 917-919).

K. B. S.-T.

TORT—WAIVER OF TORT—ALTERNATIVE REMEDIES IN CONTRACT AND TORT—ACTION ON CONTRACT OR QUASI-CONTRACT AGAINST ONE DEFENDANT DISCONTINUED—SUBSEQUENT ACTION IN TORT AGAINST ANOTHER DEFENDANT HELD MAINTAINABLE.

United Australia, Ltd. v. Barclays Bank, Ltd. [1940] 4 All E. R. 20.

THE secretary of A Company wrongfully endorsed to the M. F. C. Co. a cheque for £1,900 payable to the order of A Company, and that sum was collected and paid into M. F. G.'s account by B. Bank. A Company claimed £1,900 from M. F. G. in an action for the value of the cheque as a loan, or alternatively as money had and received. But owing to M. F. G.'s insolvency the action was discontinued, nor was anything recovered in the liquidation proceedings. A Company then instituted the present action in tort against the bank for conversion of the cheque.

The Court of Appeal, affirming Goddard J., held that by issuing the writ against M. F. G. in assumpsit, A Company had finally elected to waive their right to bring a second action in tort.

The House of Lords reversed this decision and entered judgment for A Company.

The main ground of the decision was that there was no reason why the action against B Bank should be barred by the earlier proceedings against M. F. G. M. F. G. and the bank were not joint tortfeasors; for, though their acts caused the same damage, they constituted independent torts of conversion. The decision in *Verschures Creameries, Ltd. v. Hull & Netherlands Steamship Co.* [1921] 2 K. B. 608, on which great reliance had been placed, was distinguishable in that there the earlier of the two actions ended in the plaintiffs' recovering judgment, whilst in the present case no judgment was obtained against M. F. G. Furthermore, what would be necessary to constitute a bar would be that, as a result of such judgment or otherwise, the appellants should have received satisfaction.

Viscount Simon L.C., and Lords Atkin, Romer, and Thankerton further considered that, on the authorities, there had been no final election even against M. F. G. Where waiver of tort is possible, what the plaintiff waives is not the tort itself, but a particular remedy therefor. He may sue the tortfeasor either for compensation by action for damages, or for restitution by action for money had and received. 'At some stage of the proceedings, the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment' (Viscount Simon L.C., at p. 30).

No case had actually decided that, by merely commencing the action in *assumpsit*, the plaintiff thereby debars himself from a subsequent action in tort. The *dictum* of Bovill C.J., to this effect in *Smith v. Baker* (1873) L. R. 8 C. P. 350, 355, was incorrect; the true view being expressed by Vaughan Williams L.J. in *Rice v. Reed* [1900] 1 Q. B. 54 (at p. 67) that, where there has been no judgment, the plaintiff has not lost his alternative remedy.

By this decision, procedural technicalities which had become grafted on to the law of waiver of tort are eradicated, and the law is brought more into line with the principle *ubi jus, ibi remedium*.

G. J. M.

BOOK REVIEWS.

Characterisation in the Conflict of Laws. By A. H. ROBERTSON, B.C.L., S.J.D., of the Middle Temple, Barrister-at-Law. Harvard University Press. 1940. xxix and 301 pp. (20s.)

CHARACTERISATION, sometimes referred to as qualification or classification, has been described by Dr. Cheshire as 'undoubtedly the most baffling of the many riddles presented by Private International Law'. Much has been written about it by Continental jurists and it has been discussed in Canada by Falconbridge and in the United States by Lorenzen, Cook and other writers, but Cheshire is the only English text-book writer who has dealt with it, though there are useful monographs by Beckett in the *British Year Book of International Law* and by Unger in *Bell Yard*. Taken as a whole the English legal public is, however, not 'qualification conscious' and the problem has not yet found its way into our Law Reports.

The precise nature of the problem cannot be stated without a lengthy explanation but its purport may, perhaps, be summarized by saying that it relates to the difficulties created by legal concepts of equivocal meaning which are open to different interpretations in different systems of law. Thus one system may treat a leasehold interest in land as a movable whilst another system regards it as immovable. The function of characterisation is to determine which of the conflicting interpretations shall prevail.

The problem is one of an exceedingly abstruse nature which owing to the ingenuity of the jurists has produced certain subsidiary problems known as primary, secondary or multiple characterization and the 'preliminary question'. The fact that it should be found necessary to write a book of some 300 pages on these questions casts a somewhat sombre light on the present state of Private International Law, which has a definitely practical aim, *i.e.* to provide a way out of the complications which inevitably arise when two or more systems of law are in collision. Unfortunately these complications are in no way lessened by the imposition of further complexities due to such questions as those of *renvoi* and characterization, which may furnish a happy hunting ground for those who are legalistically minded but are repellent to those whose business it is to administer the law.

But it is impossible to ignore the existence of problems of this kind however much we may dislike them. They must be faced even if only in order to discover how they can best be swept away. We have every reason, therefore, to be grateful to Mr. Robertson for his very able and lucid presentation of an extremely difficult topic. It represents the only attempt made hitherto by an English or American writer to deal exhaustively with the matter in all its various aspects, and as such it will rank high among recent contributions to the advanced study of Private International Law. He traces the development of the theory of characterisation from the time when its existence was first brought to light by Kahn in Germany and by Bartin in France, and very little that bears on the subject has escaped his attention. The nature of the underlying problem is carefully analysed

and the various suggestions for its solution are discussed. How to solve the problem is a matter of acute controversy and it may be that no comprehensive remedy can be found. We agree with Mr. Robertson that there is little hope of discovering a uniform test based on logic and principle and that a remedy of a practical kind must be found. English and American case law does not, at present, furnish any guide to those who are involved in the meshes of the problem and Mr. Robertson's book is, therefore, indispensable in such circumstances.

H. C. GUTTERIDGE.

Cases and Materials in the Law Merchant. By PHILIP WARREN THAYER, Research Associate in Comparative Law, Harvard University, with an introduction by Lord WRIGHT. Harvard University Press. 1939. xxvi and 1296 pp. (42s.)

SINCE *Tudor's Mercantile Cases* became obsolescent at the beginning of this century there has been a definite need for a modern case book of the same kind. There are, it is true, excellent publications which provide the beginner with summaries of the decisions which are essential to examination candidates, but these case books can hardly be deemed to be adequate for any other purpose. The gap is now filled by this admirable collection of cases compiled by Professor Thayer which derives additional importance from the fact that it is comparative in character and draws on materials other than those to be found in the laws of the United States and Great Britain.

The plan of the case book is as follows. Professor Thayer builds up his materials round the contract of sale which represents the main object for which commercial law exists. Parts I and II deal with the formation of the contract; Part III relates to the methods of finance employed to facilitate sales; Part IV is concerned with performance and Part V with remedies for breach. There is an appendix which sets out the principal mercantile statutes of Great Britain and the United States and the text of the more important unifying measures such as the Geneva Law of Bills of Exchange and the draft International Law of Sale formulated by the Rome Institute. Specimens of the most important instruments employed in commerce are also included. There is, in fact, very little which has escaped the attention of the learned compiler.

It is, of course, easy to criticize a case book. No two lawyers are likely to be in agreement as to the cases which should be included. Your reviewer does not propose, therefore, to be censorious in spite of the fact that he is tempted to challenge some of the selections which have been made and to call attention to certain omissions. It must also be noted that the scope of the case book is restricted. Certain topics in mercantile law are not included, e.g. the law of partnership and companies, carriage and insurance. But taken as a whole this case book emerges very successfully from such tests as it has been possible to apply, and its value as an aid to the teaching of mercantile law is beyond doubt. Instruction in this branch of the law is still in an undeveloped state in England, largely owing to the current belief that the subject cannot be taught to undergraduates. The experience of London University has shown how ill founded this belief may be. At the present time when the importance of the 'property'

subjects in a legal curriculum is liable to be diminished by legislation it would seem to be inevitable that more attention must ultimately be given to the law of business transactions. Mercantile Law has many features which make it an admirable subject for instruction in the law. As Lord Wright observes in his introduction to this case book, 'the theory of the C.I.F. contract is one of the most elegant to be found in the law'. The law of Marine Insurance, in certain of its aspects, would seem to supply an equally valuable medium for the training of the legal apprentice.

Lord Wright's introduction to this volume is of peculiar interest and importance because he was for many years a very successful teacher of Mercantile Law at the London School of Economics. He points out that the method of approach to its problems is 'different both historically and in practice' to that which is encountered in other branches of the Common Law. This is due to the impact of mercantile usages on the growth of this branch of the law and this is a factor which can only be seen in its proper perspective by a study of judicial decisions. Herein lies the value of a case book such as the one which is under review.

Lord Wright utters a word of warning which should not fall on deaf ears. 'The student', he says, 'must not lose sight of the wood for the trees' or 'forget the general in the particular'. Mercantile Law, as he points out, 'never aims at ingenuity for its own sake'. This cannot be said of every branch of the law and it furnishes a cogent argument in favour of a recognition of the value of the subject as an element in legal education.

H. C. GUTTERIDGE.

Antiquities of Bail. By ELSA DE HAAS. New York: Columbia University Press. London: Oxford University Press. 1940. viii and 174 pp. (15s. 6d. net.)

THIS book describes the origin and historical development of bail in criminal cases to the Statute of Westminster I, 1275. It is based on a careful and extensive study of the original sources, including a considerable number of unpublished Registers of Writs in the Cambridge University Library and elsewhere. Pages from some of these Registers are reproduced in plates.

Chapter I deals with theories of the origin of bail. The author takes the view (following Professor Beyerle, the latest investigator on the subject) that the modern system of bailing an accused person goes back ultimately to the giving of pledges for the payment of wergeld, which itself replaced bodily seizure of the debtor (wrongdoer), as well as the more barbarous feud. This agreement to pay wergeld was at first an extra-judicial matter, and it was no part of the function of the wergeld pledge to guarantee the appearance of the accused before a Court. However, when controversies became subject to the control and settlement of a central authority, a gradual substitution of judicial process for actual struggle was instituted, and thus the device of the surety came to be used to insure the appearance of a defendant before the designated tribunal.

In this introductory part of the book the author relies to a considerable extent upon work done on Germanic sources by German legal historians. It may be suggested that if fresh work is to be done upon the origin of

suretyship some attention might profitably be paid to early Welsh and Irish laws, which have much to say on it.

The latter part of Chapter I, and also Chapter II, are concerned with the relation of bail to frankpledge. After an exhaustive examination of Anglo-Saxon and medieval sources the view of Professor Morris is adopted (in opposition to that of Sir William Holdsworth) that frankpledge is simply a 'police' system for the prevention of crime and the arrest of criminals. When an arrest for crime had been made the tithing did not necessarily act as bailors; usually the bailors were individuals who were chosen for the particular case.

In Chapters III and IV the author traces, with a wealth of footnote detail, the history and scope of the writs governing release. Release on bail occupied a position of the utmost importance in early criminal procedure, partly because of the scanty and insecure prison accommodation, and partly, in the more serious offences, because of the length of time that might elapse before the arrival of the justices in eyre. It appears that all save certain groups of cases were replevisable by the sheriff *ex officio*. It was only if the sheriff failed to grant bail that the King's writ was sought. This writ was commonly the writ *de homine replegiando* (*Reg. Brev. f. 77b*), which expressly states that it does not apply if the crime is irreplevisable. But in addition to this the Register (*f. 268b*) contains another writ, variously called *de manucaptione* or *de ponendo*, the relation of which to the writ *de homine replegiando* has puzzled historians. On the face of it the writ *de manucaptione* in the printed Register appears to be based on Westminster I, but like the writ *de homine replegiando* it purports to be given only in a case where the crime was replevisable without it. What purpose could it have served that was not covered by the writ *de homine replegiando*? The standard histories follow Hale (*P. C. ii 124*) in saying that the only difference between bail (replevin) and mainprise lies in this, that 'he, that is delivered *per manucaptionem* only, is out of custody; but he that is bailed, is in supposition of the law still in custody, and the parties that take him to bail are in law his keepers'. This seems to be an inadequate reason for the invention of a new writ. Elsewhere, however, Hale (*P. C. ii 143*) mentions the existence of certain special writs of mainprise, which could be issued to release persons committed for offences not otherwise bailable. It is in these special writs, apparently, that we must seek the origin of the writ of mainprise in general. It appears from the present work that special writs to release persons not otherwise bailable were issued considerably before the Statute of Westminster I (p. 68). The reason why mainprise was later confused with the writ *de homine replegiando* seems to lie in an inexact use of language by the Chancery draftsmen, which made the two writs interchangeable. 'The end sought, not the technical form by which it was arrived at, was of prime significance' (p. 87).

The rest of the discussion is concerned with the writ *de odio et atia* in appeals of homicide and other felonies. Success before the inquest paved the way for release on mainprise, pending a further trial at the King's suit.

Miss de Haas's book is a scholarly study of the beginnings of the judicial machinery that was later to play so large a part in shaping the right to personal liberty.

G. L. W.

Law as Fact. By KARL OLIVECRONA, Professor of Law in the University of Lund. Copenhagen: Einar Munksgaard; London: Humphrey Milford. 1939. 222 pp. (7s. 6d. net.)

THIS interesting work on the theory of law belongs to the same school of thought as Professor Lundstedt's *Superstition or Rationality in Action for Peace?* The founder of the school (whose adherents will, no doubt, come to be known as the Swedish 'realists') is Professor Hägerström, but his chief works are available only in Swedish. British and American readers should be grateful that Professor Hägerström's two disciples have paid them the compliment of writing in their language.

Professor Lundstedt's book did not attract the attention that some of his ideas merited, principally owing to certain infelicities of presentment. The present work, while very similar to Professor Lundstedt's in outlook, is free from his theatrical and pugnacious mannerisms, and its modesty of tone makes it carry all the more conviction. Most of the book, in fact, is such pellucid common sense that it might hardly have been worth the writing if some learned jurists had not in the past written so much to an opposite effect. As it is, Professor Olivecrona performs a conspicuous service for the study of jurisprudence by bringing it back to earth.

Although a 'realist' in outlook—because he rejects 'mysticism' in any form—the author dissociates himself from the view of the American realists that law is a prediction of societal conduct. 'Do the law-givers', he asks, 'make predictions about the actions of the judges when they lay down rules about how rights are to be acquired, transferred, etc.? Certainly not. They *regulate* the future actions of the judges' (p. 214). Law, according to the author, is nothing more than a set of 'independent imperatives', i.e. patterns of conduct not commanded by any one but couched in an imperative form in order to call up the idea that certain lines of action must, unconditionally, be followed. These independent imperatives govern the activities of officials as well as other people. 'Rights' and 'duties' are simply terms used by the law as a convenient way of setting up patterns of conduct. They exist only in the imagination. It must be particularly noticed that the author does not deny the usefulness of the concepts of right and duty as a matter of legal technique. Moreover, at pp. 78–88 he expressly guards himself from the error (made by Professor Lundstedt, *op. cit.* p. 118) that 'right' is 'a mere term for actual situations in which, on account of certain rules maintained by force, certain acts give rise to certain effects'. As Professor Olivecrona points out, the right of ownership is not the same as the actual enjoyment of possession.

A few minor criticisms may be advanced, although none of them goes to the substance of the author's argument. The author does not seem to be too clear of what he means by a 'fact'. We are told that the binding force of law is an 'idea' (p. 11) which is 'obviously not a fact' (p. 14); yet ideas are facts (p. 20). At p. 34 an argument is built upon the proposition that 'a command is not a declaration of the will'. Admittedly it is not a statement of fact about the will. But is it not at least an outward expression of the will? At p. 45 the author seems to assume that 'shall' is necessarily imperative. It should have been made clear that the word may be simply a way of expressing a condition precedent

to imperatives, as in 'Every will shall be witnessed by two witnesses'. In other words, 'shall' may be used to define the mode of exercise of a legal power as well as to impose a legal duty. At p. 112 the author adopts Professor Hägerström's theory of the origin of the Roman *obligatio* in ideas of magic, but this is not generally accepted outside Sweden. Pp. 150—161 contain a discussion of the effect of law in forming moral standards in the community. This is a valuable corrective to ordinary ideas on the subject, but the author would probably not wish to deny that there is an innate morality independent of law. In fact an interaction occurs between law and morality, each contributing something to the other.

Undoubtedly the most important part of the book is the last section dealing with international law. The author makes the point, which is also insisted upon by Professor Lundstedt, that international law does not only, in some cases, inhibit violence; in some cases it actually incites to violence. The psychological function of the idea of rights, useful in municipal law, becomes a menace in the international sphere when coupled with the idea that it is necessary and proper for every State to 'vindicate' its rights by its own force.

Anyone who enjoys iconoclasm would do well to get this book.

G. L. W.

A Treatise on the Anglo-American System of Evidence in Trials at Common Law. By JOHN HENRY WIGMORE, Professor of the Law of Evidence in the Law School of Northwestern University. Third edition. Ten vols. 1940. Boston: Little, Brown & Co. (\$100.)

Megatheria of legal literature like this demand a leading article rather than an ordinary review if any fair valuation of their merits is to be made. It is due to the exigencies of war and certainly not to lack of appreciation of this great work that we must limit ourselves to what may seem to be little more than an inadequate notice of it. Of these ten volumes the last consists of 713 pages of Indexes, and the first nine aggregate 2,597 sections. An English lawyer may wonder at the size of the treatise when he remembers that *Phillips on Evidence*, the book which he commonly uses, is about one-tenth of this in length, and that *Stephen's Digest of Evidence* can be carried in one's hip pocket. The reasons for the difference are manifold. First, there are the wide variations of the law throughout the fifty, or more, jurisdictions of the United States. Secondly, the treatise embodies a good deal of the law of procedure as well as all the law of evidence. Thirdly, as to both topics, Professor Wigmore has in effect digested every Anglo-American authority and has referred to all the legal literature on them. In view of the mass of the reports with which he had to deal, the task was a stupendous one. It was not one of the labours of Hercules; it was all of them. Fourthly, a great deal of welcome historical matter is given; that, indeed, is only what we should expect of such a skilled historian. Fifthly, a large amount of semi-technical matter in the shape of anecdotes is included; thus two pages are devoted to 'Theodore Roosevelt as Character Witness', and Sir Charles Russell's trenchant analysis of 'boycotting' in his speech to the Parnell Commission appears in § 1807.

The learned author's work has been invaluable to us. Years ago we reviewed the second edition of it and we have found it an inexhaustible gold-mine on all points connected with its subject-matter,—many of them unnoticed in our English monographs simply because the problems have not arisen in practice. It is significant that he finds in the American law of evidence that 'the marked trend of the present period is a forward movement, destined within the coming generation to renovate radically the rules and the practice under the rules'.

One of the greatest living English judges said, in reviewing Professor Wigmore's *Science of Judicial Proof*: 'I realize my misfortune in that I was not a pupil of Dean Wigmore.' The reviewer of this treatise echoes the regret on his own account.

P. H. W.

Control of Aliens in the British Commonwealth of Nations.

By C. F. FRASER. London: The Hogarth Press. 1940.
304 pp. (12s. 6d.)

PRACTITIONERS and students will welcome this useful and well-written survey. The author is not content with a mere description of the working of the system of control over aliens in Great Britain and the Dominions. He frequently compares the principles obtaining in the various parts of the Empire and, occasionally, in the United States. This is so, in particular, when he subjects to criticism the system prevailing in Great Britain in the matter of naturalization of aliens and of withdrawal of the certificates of naturalization. He does not advocate the adoption of the purely judicial method which obtains in the United States, but he has no doubt that there is a *via media* between the present system of purely administrative discretion, unfettered by any obligation to assign the reasons of the decision, and the unadulterated judicial method.

The survey includes the legislation and practice of the United Kingdom, of Canada, Australia, New Zealand and South Africa. The book terminates with an illuminating chapter on the position of aliens in war time. There is a number of Appendices including the Aliens Act of 1905 and the Aliens Order of 1920. But it is strange to find that the author has disregarded the British Nationality and Status of Aliens Act of 1933. His account of the question of nationality of married women is, accordingly, sadly incomplete and to that extent misleading. Occasionally he is guilty of an unguarded statement, for instance, when he says that 'nowhere indeed does the term "British subject" mean so little as it does within the British Commonwealth itself' (p. 28). But the author is aware of the fact that, according to the law of Great Britain, British subjects, no matter from what part of the Empire they may come, are granted equality of treatment.

H. L.

A Collection of Neutrality Laws, Regulations and Treaties of Various Countries. Edited by FRANCIS DEÁK and PHILIP C. JESSUP. 2 vols. Washington: Carnegie Endowment for International Peace. 1939. 1161 pp. (\$10.)

THESE two volumes include the neutrality laws and regulations of practically all countries from 1800 until October, 1938. A supplementary volume covering in particular the neutrality regulations issued in connexion with the outbreak of the war in September, 1939, has now been prepared, and the reviewer, who, through the kindness of the editors, was enabled to make use of the advanced proof of that part of the collection, can fully testify to the indispensability of the collection as a whole. The material is grouped according to countries, and in regard to each of them is divided into measures of a permanent and those of a temporary character. The former include laws and regulations adopted irrespective of the emergencies of any particular war. The selection includes not only neutrality laws, proclamations, declarations, decrees, orders, and instructions to executive and administrative agencies. It also comprises such enactments as the British Foreign Enlistment Act and its counterpart in other countries; the laws and regulations adopted in pursuance of the London Non-Intervention Agreement of 1937 concerning the Spanish Civil War; and the various measures introduced by the State members of the League in connexion with the execution of the economic and financial sanctions during the Italo-Abyssinian War.

With regard to the latter, the learned editors, while disclaiming any expression of opinion as to the compatibility of sanctions with the traditional concept of neutrality, decided to include the regulations in question as representative of a tendency in the evolution of the law. This, it is submitted, was a proper decision—for the reason, mainly, that it is controversial which is the traditional conception of neutrality. Is it the nineteenth century law of neutral rights and duties as codified in the Hague Conventions and as determined, ultimately, by the unlimited right of States to wage war? Or is it the neutrality of Grotius and of the formative period of international law which distinguished between wars that are just in law and those undertaken without legal cause?

The collection is a monument of painstaking effort and of scholarly discretion. It is indispensable to any serious student of international law and relations.

H. L.

Law, The State, and the International Community. By J. B. SCOTT. Vol. I. *A Commentary on the Development of Legal, Political, and International Ideas.* 613 pp. Vol. II. *Extracts Illustrating the Growth of Theories and Principles of Jurisprudence, Government, and the Law of Nations.* 401 pp. New York: Columbia University Press. 1939. (60s.)

It must be a matter of profound satisfaction to students of international law that Dr. Scott decided to mark his retirement from active administrative work in the Carnegie Endowment for International Peace by

publishing these two volumes. They are of equal importance for the student of political ideas, of jurisprudence, and of international law. But Dr. Scott's work has been almost exclusively concerned with the Law of Nations, and it is both encouraging and revealing to find how broad and universal in the best sense of the word has been the philosophical basis of his thought and endeavour.

The first volume of the work contains a number of analytical studies mainly centring round a representative thinker of the period. He gives a vivid account of the contribution of ancient Greece as expressed by Socrates, Plato, Aristotle and the Stoics. The chapter on the Roman Heritage contains interesting sections on the Law of Rome, the Stoic philosophy and its relation to the later *jus gentium*, on Cicero and Seneca. There follows a vivid presentation of the Christian Heritage, ancient and mediaeval, with sections on the Hebrew prophets, St. Augustine, St. Isidore of Seville, St. Thomas Aquinas and Dante. In the chapter on the transition from mediaeval to modern thought, the author discusses the survival and influence of Roman Law and jurisprudence as well as the leading figures of the age like Marsiglio of Padua, Machiavelli, Vitoria, Bodin, Ayala and Gentili. The volume concludes with one chapter on the era of Reformation and another on the beginnings of the Modern Age. The former analyses the place of Sir Thomas More, Calvinism, Luther and Erasmus; the latter is devoted to Grotius, Suarez and Hooker.

The presentation of the subject is, on the face of it, eclectic. The author is often content to reproduce the views of other writers. But there runs through the volume a fervent and independent line of treatment which gives to the theme conceived as a whole a refreshing and inspiring unity.

The second volume contains classified extracts from the works of writers on jurisprudence, government, and the law of nations. It constitutes within its limited scope a most useful and convenient supplement to the principal volume.

H. L.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831—1860. Selected and arranged by WILLIAM R. MANNING. Vol. XII. Texas and Venezuela. Washington: Carnegie Endowment for International Peace. 1939. 858 pp. (\$5.)

THE present volume of this series, whose great importance has been emphasized in the former issues of this journal, includes, in the first instance, a considerable number of documents bearing on the recognition of the independence of Texas and its eventual annexation by the United States. The documents are of interest both for the question of recognition and of various aspects of State succession. The correspondence with Venezuela is devoted mostly to the animated controversy over the expulsion of citizens of the United States from the Aves Island. It throws light on various questions of international law relating to occupation and, in particular, to abandonment of territory.

H. L.

*The English Navigation Laws. A Seventeenth-Century Experiment in Social Engineering.** By LAWRENCE A. HARPER. New York: Columbia University Press. 1939. 503 pp. (25s.)

THIS exhaustive and scholarly study gives a critical account of the measures adopted by the British Parliament in the seventeenth century for the protection and encouragement of British shipping, as well as of the legislation enacted in the promotion of the mercantilist policy of the country by way of regulation of shipping and otherwise. The book is of special interest for the economic historian, but the student of legal history will find it not without interest. The author gives, in particular, a detailed survey of the legislative history of the Act of 1651 which contained *inter alia* provisions that salt fish may be exported only in British ships, that bullion may be imported regardless of the origin of the gold or the nationality of the ship carrying it. Of special importance are the chapters relating to the enforcement of the relevant statutes in England and in the colonies and the resulting conflicts between the common law and the admiralty Courts. In these days of food regulations the reader will find of interest the account of the legislation intended to develop the home market for fish. Penalties were prescribed for eating meat on certain days, but Parliament was anxious to avoid the imputation of religious motives and declared expressly that the statute was 'purposely intended and ment politikely'. Those who contended 'by Preaching Teaching Writing or open Speech' that the eating of fish and avoidance of meat as prescribed by the Act were 'of any necessitee for the saving of the Soule of Man' were to be penalized 'as spreaders of fause Newes arr or ought to be' (p. 29).

H. L.

Le règlement conventionnel des conséquences de remuniements territoriaux. Considérations suggérées par l'expérience de Haute-Silésie. Par G. KAECKENBEECK. Zurich: Editions Polygraphiques. 1940. 67 pp. (3 Swiss francs.)

It is not usual, but nevertheless perfectly proper, for an arbitrator to draw attention to some of the more permanent juridical aspects of the decisions rendered by him in that capacity. Dr. Kaeckenbeeck, as President of the Polish-German Upper Silesian Arbitral Tribunal established by the Geneva Convention of May 15, 1922, put his name to about four thousand decisions of which 127 have been published in a separate collection. In the present monograph he discusses some of the general questions of international law arising out of changes of sovereignty in so far as they are covered by the decisions of the Tribunal. They include problems of nationality, of protection of minorities, of interpretation and application of treaties, and of the protection of acquired private rights. With regard to the latter, the reader will find the observations of the learned President to be of special interest seeing that some, including the reviewer, have occasionally expressed doubts whether, in its efforts to find 'compromise solutions', the Tribunal had not put too narrow an interpretation on the generally recognized principles of State succession relating to the respect of private rights.

H. L.

The Dilemma of Penal Reform. By DR. HERMANN MANNHEIM, Lecturer in Criminology at the London School of Economics and Political Science. With a preface by Professor A. M. CARR-SAUNDERS. London: George Allen & Unwin, Ltd. 238 pp. (7s. 6d.)

CRIMINAL legislation and the administration of justice are developed as a resultant of many forces. That amongst these the economic factor has an important influence is a commonplace with most modern writers on sociological questions. It must be admitted, however, that few of them treat the subject scientifically. It requires exhaustive examination from all angles, and the investigator must resist the temptation to rush to conclusions reached upon researches conducted with inadequate controls. As Dr. Mannheim points out, specialized researches are needed.

The limitations of space imposed by present exigencies preclude an adequate review of Dr. Mannheim's book. It comprises the substance of a course of lectures delivered by him in connexion with the general questions raised by the Criminal Justice Bill of 1938. Although in the course of this the author necessarily ranges over a somewhat wide field the main part of the book is concerned with 'the principle of less eligibility'. Dr. Mannheim adopts a description of this principle given by Beatrice and Sidney Webb in 1910, but it would have been interesting to have had from him an account of its original formulation and of its subsequent development, showing its effects on the growth of our penal system. In the concluding chapter Dr. Mannheim makes some valuable suggestions for future developments, which merit careful attention and further investigation. This volume should certainly be included in the list of books to be recommended on our criminal policy.

J. W. C. T.

Parole With Honor. By Wilbur La ROE, Jr. Foreword by Sanford Bates. 1939. Princeton University Press. x and 295 pp. (18s. 6d.)

MR. SANFORD BATES, well known as the Director of the Federal Bureau of Prisons, and an eminent authority on penal questions, indicates succinctly the particular value of this book in describing its author as a lawyer of distinction with social consciousness. Mr. La Roe, a practising lawyer who is prominently concerned with the administration of justice, in that he is Chairman of the Board of Indeterminate Sentence and Parole of the District of Columbia, is also a leader in various departments of Social Welfare. He is thus eminently qualified to estimate the value of the parole system, for he has had first-hand experience of it on both sides. This experience has led him to the view that this system is a most valuable instrument of criminal policy, and he states the case in a most interesting and convincing manner. But for the limitations imposed by war conditions we should seek to show in more detail that this is a book which should receive the attention of all those who are interested in the consequences which this system of treatment of convicted offenders involves, not only for them but also for the society

into which it sends them to be absorbed. Finally the author should be thanked for providing a most useful comparative study in an appendix which gives a critical account of the parole machinery of the several States which have adopted this system.

J. W. C. TURNER.

The Law of Maritime Liens. By GRIFFITH PRICE. London: Sweet & Maxwell, Ltd. 1940. xxiii and 264 pp. (25s.)

MARITIME liens possess an international character and this has not been lost sight of by Mr. Price, who has made a praiseworthy attempt to deal with the subject from a comparative standpoint. In this he has not been altogether successful because his work does not result in the synthesis which should be the aim of every comparative lawyer. The best part of his book is that dealing with the English law of maritime liens. It contains a lucid and accurate statement of a very involved and difficult branch of the law. He has, in particular, brought together a considerable amount of material previously hidden away in the general text-books on Maritime Law. The chapters on the law of France, Germany and the United States describe the rules of those systems and to that extent are valuable, but the author has been content to leave the matter there without attempting to draw any conclusions from his comparison. There is also an interesting chapter on the progress of the attempts which have been made to unify the law. The book should be useful to practitioners and may be recommended to all who require a guide through the intricacies of a very complicated branch of the law.

H. C. G.

Handbook of Admiralty Law in the United States. By GUSTAVUS H. ROBINSON, Professor of Law, Cornell Law School. St. Paul, Minn.: West Publishing Co. 1939. xiii and 1025 pp.

THIS volume, published in the 'Hornbook Series', deals with a wide range of subjects, including Carriage of Goods by Sea and General Average, which are not usually regarded as Admiralty Law in this country. With the exception of procedure in the Admiralty Courts the book covers all the topics which could be brought under the heading of the Law of the Sea. Professor Robinson is to be congratulated on his treatise, which is well planned, comprehensive and clearly written. It will be welcomed by English maritime lawyers who need an up-to-date account of the law of the United States, especially in view of recent American legislation such as the Carriage of Goods by Sea Act, 1936, which concerns us somewhat closely. Admiralty Law is much the same on both sides of the Atlantic, but there are differences; and it is important that we should be aware of them in order to avoid the pitfalls which lie concealed under the appearance of general similarity. This handbook will be found to be a valuable guide for that purpose.

H. C. G.

On Circuit 1924—1937. By Sir FRANK DOUGLAS MACKINNON, Lord Justice of Appeal; Bencher of the Inner Temple. Cambridge: At the University Press. 1940. 311 pp. (18s. net.)

THIS is a delightfully written book and from it the reader will learn much of legal customs and of the traditional pomp and ceremonial attending His Majesty's judge on circuit. There is much, too, about earlier Assizes and local buildings, and, above all, judges' lodgings. There are also criticisms of the waste of time, expense and inconvenience involved in holding Assizes at the numerous small Welsh towns and of the absurdity of retaining an Assize at Kingston for the county of Surrey. But in spite of the claim made in the last paragraph of the book that the Circuit System is capable of reform and improvement, there is surprisingly little about this aspect of the Assize System to be found. Indeed, such criticisms as those mentioned above stand out less conspicuously than the author's hatred for the architects Butterfield and Waterhouse, his dislike of clumsy Victorian furniture and the depression, to which he seems to have been a frequent victim, caused by draughty judges' lodgings and hearing undefended divorce cases. In spite of all, however, it is clear that Lord Justice MacKinnon enjoyed going on circuit both for its present work and for its associations with the history of English legal institutions, and he has much to tell which is interesting and valuable, particularly of the time spent out of Court.

Nevertheless, in some ways these recollections are disappointing; it would have been interesting to have been told what Lord Justice MacKinnon seriously thinks of the working of the Assize System and of Trial by Jury in criminal cases in some of the great northern towns such as Leeds and Manchester, where far more people are affected by them than in the south of England. But Manchester and Leeds were depressing to the learned judge and are summarily dismissed on aesthetic grounds, while Trial by Jury is condemned because, it seems, an obstinate jury in a civil case at Norwich delayed the judge so long that he lost the last convenient train to Chelmsford. We cannot help feeling that, for all the charm and interest of this book, more could have been written on these things and that what so experienced a judge could have said would have been invaluable. Is it too much to hope that while his recollections are still fresh Lord Justice MacKinnon will do this?

P. DEAN.

International Law. By L. OPPENHEIM, M.A., LL.D. Vol. II: Disputes, War and Neutrality. Sixth edition. Edited by H. LAUTERPACHT, M.A., LL.D., Whewell Professor of International Law in the University of Cambridge; of Gray's Inn, Barrister-at-Law. London: Longmans, Green & Co. 1940. xliv and 766 pp. (50s. net.)

It would, perhaps, have been desirable that the publication of a new edition of the second volume of the late Professor Oppenheim's great work should have been postponed until the end of the war, when a more comprehensive survey could be made of the modifications in international rules

and doctrines which have resulted from the new conditions emerging in the course of the present conflict. But, apart from the uncertainty as to the duration of hostilities, the rapidly changing conditions of international relations have made it necessary to make some provisional restatements of many of the hitherto accepted doctrines on the subject of Neutrality and to elucidate the somewhat vague topic of Non-Belligerency, which for the time being appears to be displacing them. In view of the "frauds on the law" resorted to by the Axis Powers, it has also become clear that a new interpretation of the older rules defining the obligations of neutrals, as exemplified by the recent cases of the *City of Flint* and the *Altmark*, is required. These matters, and many others demanding comment, have now been dealt with succinctly but adequately by Professor Lauterpacht.

D. T. O.

A Concise History of the Common Law. By T. F. T. PLUCKNETT, M.A. (Lond.), LL.B. (Cantab.); Professor of Legal History in the University of London. Third edition. London: Butterworth & Co. (Publishers), Ltd. 1940. xxx, 672 and 45 pp. (20s.)

BESIDES taking account of historical research since the last edition, Professor Plucknett has added three new chapters on inheritance, intestacy and wills. It may well be due to the author's modesty that, except for a bare reference to the literature in a footnote at p. 335, nothing is given of the controversy as to the effect of the statute *in consimili casu*. He initiated this in 1931 and it drew into the arena Sir William Holdsworth, Mr. Landon and Dr. E. J. Dix. The omission to give any account of it is tantalizing to students to whom the *Columbia Law Review* and the *Yale Law Journal* are not always accessible. Incidentally, Dr. Dix has discovered a case of 1367 in which trespass and case are distinguished, although Professor Plucknett implies that the earliest instance is 1390 (p. 336). It is in no derogation of the established scholarship of the book, but simply because we use it as well as own it, that we make two more suggestions for the next edition; first, at least a page or two on the history of quasi-contract might be inserted; secondly, a definition of contract in modern law might be given before the exposition of its history is begun; the absence of this may easily mislead the student into thinking that 'Contract in Anglo-Saxon Law' (the caption on p. 560) was anything like what we now understand by the term. In fact, as Sir William Holdsworth has pointed out, only the roots of it are traceable in that period.

P. H. W.

The Canadian Law of Trade Marks and Industrial Designs. By HAROLD G. FOX, M.A., LL.B., B.C.L., one of His Majesty's Counsel. University of Toronto Press. 1940. lxviii and 700 pp.

THIS volume, which is one of the University of Toronto Legal Studies under the editorship of Professor W. P. M. Kennedy, should prove of great assistance to the English lawyer and in particular to the student

of Comparative Law. We are not competent to assess its value as a statement of Canadian law, but we may say (we hope without impertinence) that the author's high professional standing and the editorship of Professor Kennedy should sufficiently warrant this. What we appreciate especially is the advantage of having before us an account of the Canadian Unfair Competition Act, 1932. That, of course, is only one of the topics in the book, but to any one interested in law reform it is one of the most important parts. The learned author regards it as ill-drawn, but none the less a step in the right direction. That is our own humble opinion. We wonder what the relation of section 11 of the Act is to a case of the type of *White v. Mellin* [1895] A. C. 154. It is implied at p. 337 that such conduct is not actionable according to the Canadian authorities, although we should have thought that section 11 (c) would have made it unlawful even if section 11 (a) did not.

The difficulties raised by some of the remarks of the judge in *Heppells, Ltd. v. Eppels, Ltd.* (1928) 46 R. P. C. 96, might be discussed in the next edition.

P. H. W.

The Law of Income Tax. By E. M. KONSTAM, K.C., a judge of county courts. Eighth edition. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1940. 98 and 811 and (Index) 55 pp. (£2 12s. 6d. net.)

THERE is little that can usefully be said about a book as well known as *Konstam's Income Tax*. It is nearly twenty years since the first edition was published, and in that time the author has steadily polished and improved what has from the first been recognized as a reliable and lucid practitioners' text-book. The present edition appears to have incorporated all the relevant new statutes and case-law, although it may be noted that since it went to press the decision of Lawrence J. in *Sothorn-Smith v. Clancy* [1940] 2 K. B. 276 (p. 205) has been reversed by the Court of Appeal ([1941] 1 All E. R. 111). Thinner paper has been used for this edition, with the result that a book over a hundred pages longer than the seventh edition is nearly half an inch less thick. Present conditions make it hardly surprising that the price has been increased by half a guinea. The only suggestion which we can make is that the author should improve an already useful index by arranging the items alphabetically under each word; thus at present under 'Surtax' (p. 856) the first words of six successive entries are 'Notice', 'Assessment', 'When', 'Collection', 'Relief', and 'In', in that order, and this cannot be called good indexing.

R. E. MEGARRY.

Contemporary Juristic Theory. By ROSCOE POUND. Claremont, California: Pomona College, Scripps College, Claremont Colleges. 1940. viii and 83 pp. (\$1.50 net.)

IN this book Dean Pound publishes three lectures delivered by him at Claremont, California, early in 1940. Lecture I deals with the revival of absolutism in government, and the recrudescence of political and juristic

ideas appropriate to that form of rule. The author examines not only the political absolutism of a superman head but also the administrative absolutism of agencies of social control, as well as the idea of juristic absolutism which is the result of the extreme 'realist' mode of thought lately fashionable in America. Lecture II is an attack on the 'give-it-up philosophies', i.e. the various brands of realism. These philosophies assert that 'there is nothing more to politics or jurisprudence than force or threats', and in the author's view lead to absolutism. He refuses to be induced by them to give up as insoluble 'the hard practical problem of law-making and application of law', which 'is to find and apply a measure of values by which to determine what human claims or demands or desires to recognize, within what limits to give effect to them when recognized, and how to secure them within the determined limits consistently with the securing of other recognized and delimited interests'. In the third lecture, which is perhaps the most valuable of all, Dean Pound devotes himself to this problem of a measure of values.

G. L. W.

Conditions of Sale of Land. By E. O. WALFORD, LL.D. (Lond.), Solicitor of the Supreme Court. London: Sweet & Maxwell, Ltd. 1940. xxiv and 352 pp. (17s. 6d. net.)

THIS book is in form a commentary upon the Law Society's Conditions of Sale. Each condition is set out in full and is followed by the learned author's observations upon the relevant rules of law. There is also an appendix which covers special problems arising through the existence of a state of war. The text is well supported by references to decided cases, and there are many indications that the book will be of real value to practitioners. Its form, however, hardly permits of its use as a text-book for elementary students, and its preface disclaims any intention to cover the whole field of the law of vendor and purchaser. Although as a rule (e.g. Chapter XI) the learned author does not unduly confine his treatment of the law to the bare limits of the particular condition of sale with which he is primarily concerned, the reader is not entitled to expect from a commentary of this type a complete text-book upon the sale of land. The decision in *Re Duce and Boot's Contract* [1937] Ch. 642, for example, is here cited (as *Re Duce* [1937] 3 All E. R. 788) solely as a guide to the proper construction to be placed upon a condition of sale concerned with receipts given by a building society.

S. J. B.

The Law of Wills. Second edition. By S. J. BAILEY, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Fellow of St. John's College, Cambridge, Lecturer in the University of Cambridge. London: Sir Isaac Pitman & Sons, Ltd. 1940. xxxi and 268 pp. (20s. net.)

WE know of no better introductory survey; it provides a solid foundation and has sufficient detail for any examination in the Law of Wills. There is an admirable introductory section on the main conceptions

of Property Law of to-day, and a comprehensive survey of the nature and historical development of wills, intestacy, capacity, execution, revocation and revival, legacies and devises and the equitable doctrines affecting them, conditions, rules against remoteness, construction and administration. This edition has new chapters on Intestacy and Administration of Assets, and a new section on the Inheritance Act, 1938. About seventy cases and seven statutes which appeared since 1935 are duly incorporated in the text, involving an addition of some sixty pages. The chapter on Rules against Remoteness is particularly well done and numerous examples from very recent cases are so clearly explained as to solve most of the difficulties of the young martyr to 'perpetuities'.

T. E. L.

Annual Survey of English Law, 1939. London: published for the London School of Economics and Political Science (University of London) Department of Law by Sweet & Maxwell, Ltd. 1940. xxxvi and 424 + Index 438 pp. (10s. 6d.)

THE 'evacuees from Houghton Street' have produced an excellent number in difficult circumstances. They have surveyed the whole field of law in a scientific manner; here is the labour of the few to the profit of the many, and no academic or practising lawyer can do without their *Survey*. Case law forms the main bulk, and the examination, and, where necessary, the criticism of judicial decisions for 1939 makes interesting, stimulating and profitable reading. Four months of war produced emergency legislation which can only be summarized in forty-seven pages, and practically every section has a further quota of this legislation.

Tort, Property and Conveyancing, and Mercantile Law, each take over forty pages, Contract is in the 'over thirties', while Criminal, Industrial and Administrative Law take just under that. The Limitation Act, 1939, provides material for nearly all contributors. The Property cases have mostly turned on statutory provisions. Impossibility and Mistake are prominent troubles in Contract. The note on *Spence v. Crawford (restitutio in integrum)* at pp. 174-6 is particularly valuable. The Law of Tort has two or three 'remarkable judgments', and the majority of the cases are concerned with negligence, nuisance and defamation. Mercantile Law had a very busy year, while Industrial Law gave rise to many breaches of statutory duty.

The industry of the contributors is amazing, and we congratulate them on a first-class publication.

T. E. L.

Byles on Bills. Twentieth edition. By A. W. BAKER WELFORD, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1939. lxxix and 456 pp. (£2 2s.)

Byles himself was responsible for the first edition in 1829, and for subsequent editions to 1866. A *Byles* was connected with every later

edition, until the present editor took complete charge in 1931. Mr. Baker Welford has produced an accurate and up-to-date edition of this great classic, and has incorporated in the text a crop of important recent cases both English and Dominion. Among many others we note *Gibbons v. Westminster Bank* (1939) 55 T. L. R. 888 (damages for dishonour); *North and South Insurance Co. v. National and Provincial Bank* [1936] 1 K. B. 328 (pay cash); *Hibernian Bank v. Gysin and Hanson* [1939] 1 K. B. 483 (not negotiable—is very thoroughly discussed at pp. 93-4); *Lloyds Bank, Ltd. v. Savory* [1933] A. C. 201 (negligence of banker); and the *Slingsby* cases. It is a practitioner's book, the latest and most detailed, and it needs no commendation; those who have to deal with the difficult subject of negotiable instruments know that they cannot do without it.

T. E. L.

Conveyancers' Year Book, 1940. By Sir LANCELOT H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law; one of the editors of the twenty-third edition of 'Prideaux's Conveyancing Precedents'. Vol. I. London: The Solicitors' Law Stationery Society, Ltd. 1940. xl and 325 + xli - lxxiv pp. (10s. 6d. net.)

THE object of this volume is 'to help conveyancers in bringing their knowledge up-to-date'. In a clear and concise form it gives the effect of all the relevant decisions, statutes and rules and orders for 1939. Alphabetical headings and a comprehensive index make for easy reference. Where new forms are suggested they have the authority of a decided case to support them. The summaries of the new Acts and decisions are models of compression and clarity. Conveyancers will welcome this volume, and will look forward to subsequent annual numbers.

T. E. L.

Chorley & Tucker's Leading Cases on Mercantile Law. Second edition. By R. S. T. CHORLEY, M.A., of the Inner Temple, Barrister-at-Law; Cassel Professor of Commercial Law in the University of London. Assisted by O. C. GILES, LL.M. of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1940. xxvii and 353 pp. (10s. 6d. net.)

THIS is a companion volume to *Stevens' Mercantile Law*. The second edition has been thoroughly revised in the light of Professor Chorley's six years' use of it for teaching; twenty-six new cases and five new statutes have been added. The facts of the cases are well digested and pertinent extracts are given from the judgments. The supplementary notes that follow refer to numerous other cases, and no recent decision of importance to students is overlooked. The work is extremely well done and students will find it most useful.

The Factories Act, 1937. Second edition. By H. SAMUELS, M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law. London: Stevens & Sons, Ltd. 1939. xxi and 702 pp. (42s. net.)

THIS edition, giving the text of the great consolidating Factories Act, 1937, with detailed notes and cases on every section and covering some 354 pages, is one of the most thorough and reliable works on the subject. The Appendix of 292 pages deals with the regulations for dangerous trades, welfare orders, other orders, and draft orders. Immense labour has been put into this edition, for the difficulties of this type of legislation are well known to all who are interested in law or social work. The emergency legislation has produced further changes in this subject and we can sympathize with the author in that his commentary was published before this legislation appeared.

Digest XLVII 2. De Furtis. Edited with Introduction, Translation and Notes by H. F. JOLOWICZ, LL.D., Professor of Roman Law in the University of London. Cambridge: At the University Press. 1940. xci and 137 pp. (10s. net.)

It is over thirty years since the late C. H. Monro's edition of this title was published by the University Press, and although it has been reprinted once or twice, a new commentary embodying references to the contributions of, among others, Professor Schulz, Levy, and de Visscher on the Continent and of Professor Buckland in England has been long overdue.

Professor Jolowicz has produced a very thorough piece of work, and students of this title will find that a study of his well-arranged and clear Introduction with references to the appropriate texts will furnish them with all the material they require to enable them to deal with the questions, often of some difficulty, arising in the course of its perusal.

D. T. O.

Brooke's Treatise on the Office and Practice of a Notary in England, with a Collection of Precedents. Ninth edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1939. xv and 464 pp. (30s. net.)

THE new edition of this classic is very welcome. A new chapter on Drawings of Foreign Bonds and Debenture Stock has been added. The origin and development of this interesting office is well told, and an up-to-date account is given of the Notary's present practice in dealing with bills, notes, charterparties, bottomry bonds, and ship protests. One hundred and thirty-four precedents are given, and there is an appendix of relevant statutes.

Powers of Attorney. Issued by the Council of the Chartered Institute of Secretaries of Joint Stock Companies and other Public Bodies. Fifth edition. Compiled by the Council by H. M. COHEN, Solicitor. Cambridge: Heffer & Son, Ltd. 1940. x and 141 pp. (7s. 6d. net.)

FIVE editions in thirteen years are sufficient proof of the merits of this manual, and that it is well used by business men, bankers, company secretaries and lawyers. About seventy pages of text give a clear account of powers of attorney; the appendices of leading cases, forms, relevant statutes down to date make it a very useful work.

Studies in the History of Political Philosophy before and after Rousseau. By C. E. VAUGHAN, M.A., Litt.D., formerly Professor of English Literature in the University of Leeds. Edited by A. G. LITTLE, M.A., F.B.A. Volume I: From Hobbes to Hume. Volume II: From Burke to Mazzini. Manchester University Press. 1939. Volume I: xxix and 364 pp. Volume II: xxvi and 336 pp. (25s. net.)

PROFESSOR VAUGHAN'S book was first published posthumously in 1925, and represents almost a life work of its eminent author. It was immediately recognized as an outstanding contribution to the history of political philosophy, and we congratulate the publishers on making available the present reprint at the very low price of 25s. for the two closely-packed volumes. Volume I has chapters on Hobbes, Spinoza, Locke, Vico, Montesquieu, and Hume, while Volume II deals with Burke, Kant, Fichte, Hegel, Comte, and Mazzini.

G. L. W.

The Courts (Emergency Powers) Act, 1939. By the Editors of 'Law Notes'. Second edition. London: 'Law Notes' Publishing Offices. 1939. viii and 78 pp. (3s. net.)

THIS annotated edition of the Courts (Emergency Powers) Act incorporates the Rules made under the Act in 1939. Reference is made to decisions on the Act up to the date of publication, and also to decisions on the similar Acts of 1914 to 1919. The booklet is as good as all the publications bearing the name of 'Law Notes'.

G. L. W.

The Law in Quest of Itself. By LON L. FULLER, Professor of Law, Duke University; Visiting Professor, Harvard Law School. Chicago: The Foundation Press, Inc. 1940. vii and 147 pp. (\$2 net.)

THIS is a series of three lectures provided by the Julius Rosenthal Foundation for General Law, and delivered at the Law School of Northwestern University at Chicago in April, 1940. Professor Fuller makes

a spirited attack on the positivist mode of thought which seeks to draw a rigid distinction between law as it is and law as it ought to be. Incidentally he passes in review some of the main theories of law that now hold the field.

G. L. W.

World Court Reports. A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice. Edited by MANLEY O. HUDSON. With the collaboration of RUTH E. BACON. Vol. III, 1932—1935. Washington: Carnegie Endowment for International Peace. 1938. 548 pp. (\$2.50.)

THE above title of this invaluable collection—whose usefulness is greatly enhanced by the additional notes and bibliography—explains the contents of the present volume. It is much to be hoped that Judge Hudson will before long present us with a further volume of the *Collection*. It is published at a price which enables every student of international law to possess this indispensable instrument of work and study.

Wurtzburg's Law Relating to Building Societies. Eighth edition. By G. W. KNOWLES, M.A., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1940. xxxii and 427 pp. (21s. net.)

THIS edition maintains the high standard of its predecessors. There are special chapters on the Building Societies Act, 1939, and Emergency Legislation. The Courts (Emergency Powers) Amendment Act, 1940, was passed too late for inclusion, but its substance is shortly stated in the Preface. The work has been thoroughly revised and brought up to date.

M. C. and S. C. Sarkar's Law of Evidence in India and Burma. Sixth edition. By S. C. SARKAR, Judge, Calcutta Small Cause Court. Calcutta: S. C. Sarkar & Sons, Ltd. 1939. 141 and 1411 pp. (Rs.16.)

THIS is the sixth edition of a commentary on the Indian Evidence Act, first published in 1912, and now grown into a bulky volume. India has several supreme Courts, all of equal authority, and numerous unofficial law reports, the compilers of which are active, and often, it may be added, merciless. If the legal profession demands a work in which all reported cases shall be noticed, the author's task calls for much diligence and care, which Mr. Sarkar can justly claim to have exercised in the present instance.

A. C.

Principles of Company Law. Third edition. By J. CHARLES-WORTH, LL.D. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1940. xxxii and 328 pp. (7s. 6d. net.)

THIS is one of the most readable text-books for students on the subject. No great changes have been necessitated in the present edition, but the work is competently brought up to date.

G. L. W.

The Solicitors' Handbook of War Legislation. By S. M. KRUSIN, B.A., and P. H. THOROLD ROGERS, B.A., B.C.L. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd.; The Solicitors' Law Stationery Society, Ltd. 1940. lx and 836 pp. (30s.)

First, Second and Third Supplements to the above. (7s. 6d., 17s. 6d., and 15s. respectively.) 1940.

THE scope of this work is clearly indicated by its title. It does not set out to reprint every bit of the emergency legislation, but it does aim at furnishing the practitioner with that part of the legislation that is most likely to concern him, together with a commentary upon it where necessary. There is a very useful cumulative index to the Third Supplement, which makes the material in all the Supplements readily available. We cordially recommend the work to every practitioner, and would not ourselves be without it.

G. L. W.

Rent and Mortgage Interest Restrictions. Eighteenth edition. By the Editors of 'Law Notes'. London: 'Law Notes' Publishing Offices. 1940. xxvii and 365 pp. (12s. 6d. net.)

THIS book has come to be regarded as the standard exposition of the Rent Acts, and now that the Acts have been given a new lease of life the present edition is more than ever welcome. The impact of the 1939 Act upon existing legislation is carefully explained in conjunction with each section of the existing Acts.

G. L. W.

Mr. Justice Miller and the Supreme Court, 1862—1890. By CHARLES FAIRMAN. Cambridge, Mass.: Harvard University Press. London: Humphrey Milford, Oxford University Press. 1940. ix and 456 pp. (25s. net.)

PROFESSOR FRANKFURTER (as he then was) once remarked that "about most of the Justices of the Supreme Court we have only mortuary

estimates". Mr. Fairman has removed all grounds for complaint so far as Mr. Justice Miller is concerned, and this biography can safely be compared with that of Marshall by Beveridge. As the title implies, Mr. Fairman's book deals almost exclusively with Miller as a member of the Supreme Court and with his part in moulding the decisions of that body in the post-Civil War period. It has three great merits. Besides throwing light on a number of controversies (particularly on the Legal Tender Cases), it gives us an intimate knowledge of one of the most eminent members of the Court and a deep insight into the way in which the Court itself functions. Space does not permit one to do full justice to the excellence of this work, but one can sum it up by saying that it is the most outstanding judicial biography of recent years.

Reviews of the following two books are held over owing to the illness of the reviewer:—

Kingship and Law. By FRITZ KERN; translated with an introduction by S. B. CHRIMES. Oxford: Basil Blackwell. 1939.

Rolls of the Warwickshire and Coventry Sessions of the Peace, 1377—1397. Transcribed and edited by ELISABETH GUERNEY KIMBALL, with an analytical index of indictments by THEODORE F. T. PLUCKNETT. Published for the Dugdale Society by Humphrey Milford, Oxford University Press. 1939.

Other books and publications received (some of these will be reviewed in the next issue):—

Chicago Bar Record. Vol. XXI: Nos. 6, 7, 8, 9, 10; and Rules of the United States District Courts. Published by the Chicago Bar Association. 1940.

The Rotarian. March, 1940. 'The Sentence of the Court Is—', by ERNEST L. REEKER, Judge, County Court, Juvenile Division, Madison, Nebraska.

Rassegna di Letteratura e Legislazioni Straniere Inghilterra (Estratto dalla Rivista di diritto processuale civile). 1939. *Il Problema delle Origini e del Primo Sviluppo del Processo Penale in Inghilterra secondo la recente dottrina del Goebel.* By MICHELE G. DE ROSSI.

The Straits Settlements Law Reports, 1939. Edited by JOHN LAYCOCK and R. WILLIAMSON, Advocates and Solicitors of the Supreme Court of the Straits Settlements for the Government of the Straits Settlements. Published by Authority. Singapore: Government Publications Department, 1940. xxxvii and 292 pp. (\$15 or 35s.)

Chicago Bar Record. Vol. XXII. Nos. 3, 4, 5. Published by the Chicago Bar Association. 1940—1941.

